INTRODUCTION: MAKING A MURDERER?

The 2015 Netflix documentary “Making a Murderer” was a worldwide sensation.¹ The ten-part series told the story of Steven Avery of Manitowoc, Wisconsin, and his nephew, Brendan Dassey, who were convicted of the gruesome 2006 homicide of Teresa Halbach.² The series raised serious questions about whether the two were actually guilty or the victims of law enforcement malfeasance.³ Viewers were
divided on Avery, with as many saying he was guilty as not guilty.\(^4\) Viewers were not nearly as divided, however, about Avery’s sixteen-year-old nephew, Brendan Dassey.\(^5\)

Brendan was a developmentally-delayed special education student whose treatment by all parts of the criminal justice system, including his own attorney, was at best an embarrassment, and at worst, the direct cause of a grotesque wrongful conviction.\(^6\) For many, the most disturbing aspect was the footage of eager law enforcement extracting a “confession” from Brendan in ways that were both comical and cynical.\(^7\) One commentator likened the interrogation to training a new puppy.\(^8\) The most memorable part of the interrogation came when investigators harangued Brendan about what was done to Ms. Halbach’s head. Brendan proceeded to guess: Cut off her hair? Punched her? Cut her throat? When he said he could not remember anything else despite investigators’ insistence, they blurted out: “Alright, I’m just gonna come out and ask you, who shot her in the head?” Brendan replied, “he [Avery] did.”\(^9\) When asked why he had not told them, Brendan said, “[c]ause I couldn’t think of it.”\(^10\) Later, after Brendan had “confessed” to raping and killing Ms. Halbach, he asked if he could return to school because he had “a project due in [sixth] hour.”\(^11\)

Not surprisingly, the full statement is filled with contradictions and physical impossibilities. Nevertheless, law enforcement cobbled together enough of a confession to form the basis of the charge that Brendan had assisted Steven Avery in killing Ms. Halbach.\(^12\)

Despite glaring overreach by law enforcement (the series only captured a miniscule fraction), the trial court found that Brendan’s confession was voluntary and it was admitted as the primary piece of


\(^5\) See, e.g., Shammas, supra note 4.

\(^6\) See id.

\(^7\) See id.

\(^8\) See id. (“They treated Brendan like I treat my beagle puppy when I want him to stop ransacking the carpet. When Brendan implicated himself in criminal activity, the police squeaked: ‘Good boyyy. Good doggie!’ They rewarded him with Mountain Dew and sandwiches. ‘Have a treat, boy!’ But when he stuck to his original story—the one devoid of rape and murder—they scowled: ‘Bad doggie! No rest for you!’”


\(^10\) Id.

\(^11\) Id.

\(^12\) See Shammas, supra note 4.
evidence in his trial. He was convicted as a party to the homicide and sentenced to life imprisonment. The voluntariness of Brendan’s confession was the primary issue in an unsuccessful state appeal and federal habeas corpus action. Brendan continues to serve a life sentence.

The co-authors watched “Making A Murderer” with both personal and professional interest. Of course, we were taken by the drama, though we knew the outcome for Avery and Dassey long before the show ever appeared. But we were particularly intrigued by the interrogation of Brendan Dassey. More specifically, we were curious about the linguistic aspects of the interrogation. We both have professional interest in language impairments, i.e., deficits in language and language usage. We are well aware that despite the innocuous name, language impairments can be serious disabilities with potentially catastrophic effects. We are also aware that individuals with language impairments are substantially overrepresented in the criminal and juvenile justice systems. Though the documentary never came out and said that Brendan had a language impairment (throughout the program and the criminal case itself, there are references to Brendan’s intellectual deficits and borderline IQ, but there are few specifics), we were fairly certain he did. And if he did, we were certain it would have had a profound effect on the interrogation.

Our first step was an easy online search of court records, where we found documentation that Brendan did indeed have a severe language-based specific learning disability and multi-faceted language impairment that placed his communication and processing
skills in the lowest percentiles of all juveniles his age.19 Brendan’s brutally low scores, which one expert termed “appalling,”20 inspired us to undertake a closer look at the language of the interrogations. With the assistance of a language transcription company, we conducted a thorough qualitative and quantitative analysis of the communication and language of the complete interrogation. We took a deep look under the hood, examining the volume and structure, as well as the content, of what was said by both Brendan and law enforcement.

We quickly concluded that the interviewing “technique” utilized by law enforcement was a chaotic, unprofessional mess. Almost everything the two officers did in the course of interrogating Brendan violated the most minimal standards for interviewing any juvenile, but especially one with underdeveloped language and communication skills. They inundated him with verbiage, continuously asked multiple questions within a single turn, spoke in paragraphs, changed topics in the middle of an oration, asked hundreds of leading questions and planted content thousands of times.21 By the time we finished our review, we were, and are, confident that the verbal behavior of law enforcement throughout the interrogations of Brendan, coupled with his poor ability to linguistically cope and his age, made him a prime candidate for unwillingly—and unwittingly—confessing to a crime he did not commit.22

Our analysis has little in common with the voluntariness ruling by

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20 E-mail from Alison McCullough, MBE, Head of N. Ir. Office, Royal Coll. of Speech & Language Therapists, to Michele LaVigne, Distinguished Clinical Professor of Law, Univ. of Wis. Law Sch. (Sept. 6, 2017, 09:03 AM MDT) (on file with author).


the trial court. That ruling demonstrated a remarkable ignorance of how humans communicate in general, let alone the special issues presented by someone like Brendan Dassey. The decision instead closely parsed apparent promises of leniency to show that they were not actual promises of leniency, and noted that law enforcement did not yell and allowed Brendan to sit on a soft couch. The decision even suggested that Brendan was not really a special education student because part of his school days was spent in “regular-track high school classes.” Tragically, this decision was the foundation for a long legal journey that ended in June 2018 with a denial of certiorari by the U.S. Supreme Court.

Admittedly, nobody else involved in the case seemed to know much about communication or Brendan’s impairments either—not law enforcement, not even his own pre-trial attorney. A record of Brendan’s language disability and its significance was never developed during the pretrial hearings, although counsel possessed the testing results. Of course, in order to remain so oblivious, all parties must have completely disregarded the records that laid out Brendan’s deficits in the plainest of terms.

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24 See State v. Dassey, 2013 WI App 30U, ¶ 6, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam); Dassey, slip op. at 7–8, 10.
28 See infra Part VI, for a discussion of the records; see also Trial Exhibit 219, supra note 19 (finding that Brendan had a documented learning disability and speech or language
been blind to the behavioral and verbal cues that Brendan would have provided any time they met.

This Article describes our under-the-hood analysis of the interrogations of Brendan Dassey and explains why we believe that reckless and amateurish behavior of law enforcement in the face of Brendan's communication deficits directly contributed to an involuntary, and utterly unreliable confession. We are hardly alone in thinking that the confession violates the most basic standards of common decency and due process, and that, even with the existing record, it never should have been admitted at trial. Our analysis simply provides another layer. You could say that this is our fantasy attempt to supplement the record, albeit a decade later. This is also our attempt to proselytize about language impairments and their insidious effects.

Our approach is interdisciplinary and informed by our experiences and research in two different fields—law and speech-language pathology. While the legal community in the United States is just beginning to notice the speech-language profession, we have found that law and speech-language pathology are a natural fit. Co-author Dr. Sally Miles' clinical and research expertise in the field of speech-language pathology has allowed us to collect and analyze language data in ways not usually found in law. She has also provided clinical observations along with expert opinions of the type that a lawyer would rely on both in and out of court.

This Article will not rehash or reframe the material covered in the pleadings filed in state and federal court on Brendan's behalf. Those motions and supporting briefs did a masterful job of describing the myriad ways that law enforcement unambiguously fed Brendan—a child—specific incriminating details, promised leniency, and repeatedly lied about their “superior knowledge.”

impairment).

31 See LaVigne & Van Rybroek, supra note 18, at 120–22.
32 Obviously, the speech-language pathologist and the law professor made different contributions to this enterprise. Rather than attempt to sort out who did what, this Article simply attributes all actions and conclusions to “the co-authors” or “we.”
33 See Fed. R. Evid. 702.
Here, the focus is not so much on what was said by law enforcement, but how it was said. And, why how it was said would prey on the very specific weaknesses of someone like Brendan. We provide examples throughout our analysis and discussion, but readers are encouraged to listen to the recordings of the interrogations to get the full flavor.  

This Article is foundation-heavy. We spend considerable time talking about language impairments in general and the science of interviewing. This type of background information is necessary for our analysis to make any sense. Then, we turn to this case. First, we discuss what we learned about Brendan’s language impairments from his school records (all in the court record) and what they tell us about his communicative ability to cope in an interrogation. Then, we move on to our qualitative and quantitative analysis of the interviews/interrogations. We certainly looked at Brendan’s verbal and non-verbal conduct, but as the discussion reflects, we ended up paying more attention to law enforcement’s verbal and non-verbal conduct because it was so much more remarkable—and not in a good way. Finally, we return to the court decisions —the trial court and the Seventh Circuit Court of Appeals en banc majority—to show how courts completely missed the realities of Brendan’s impairments and the egregiousness of the interviewing “technique” used by law enforcement.  

There will be no happy ending to this Article. As Judge Ilana Rovner said in her scathing dissent to the Seventh Circuit en banc decision, this is “a profound miscarriage of justice.” The best we can hope is that the knowledge and principles we have applied can inform other cases. There are countless Brendan Dasseys at the receiving end of the criminal justice system, and they all deserve justice.

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35 Audio recordings of Brendan’s interrogations are available online. See generally Police Interviews and Interrogations and Audio Recordings, STEVEN AVERY TRIAL TRANSCRIPTS & DOCUMENTS, http://www.stevenaverycase.org/police-interviews-and-interrogations/ (last visited Feb. 23, 2019) (providing examples of instances where police used a forceful tone when Brendan provided insufficient answers); see also Brian McCorkle, The Importance of Understanding, CONVOLUTED BRIAN: WEBSITE BRIAN MCCORKLE (last updated Nov. 25, 2016), https://www.convolutedbrian.com/dassey_confessions_links.html (providing instances where police would switch tone of voice to sound disappointed in Brendan so that he would not lie).

I. STATE OF WISCONSIN V. BRENDAN DASSEY

Teresa Halbach of northeastern Wisconsin went missing on October 31, 2005.\(^{37}\) She was last seen on the property of Steven Avery of Manitowoc, Wisconsin.\(^{38}\) Within two weeks, it was determined that she had been murdered and her body mutilated.\(^{39}\) Ms. Halbach’s remains were found on Avery’s property.\(^{40}\) From the beginning, Avery was the prime suspect.\(^{41}\)

On November 5th, Avery’s sixteen-year-old nephew, Brendan Dassey, who lived with his family down the road from Avery, was interviewed by law enforcement from neighboring Marinette County.\(^{42}\) Law enforcement was attempting to find out whether Brendan had seen Ms. Halbach on Avery’s property.\(^{43}\) Avery was officially charged with the crime on November 15, 2005.\(^{44}\)

In February 2006, law enforcement was alerted to the fact that Brendan had been acting strangely and had been seen on Avery’s property on October 31st.\(^{45}\) On February 27th, Brendan was interviewed by Calumet County Sheriff’s Investigator Mark Wiegert and Wisconsin Department of Justice Special Agent Tom Fassbender (Wiegert and Fassbender).\(^{46}\) He was questioned twice with his mother’s consent, once at school and then at the local police station.\(^{47}\)


\(^{38}\) State v. Avery, 2011 WI App 124, ¶ 4, 337 Wis. 2d 351, 804 N.W.2d 216.

\(^{39}\) [See Dassey v. Dittmann, 201 F. Supp. 3d 963, 967–69 (E.D. Wis. 2016), aff’d, 860 F.3d 933 (7th Cir. 2017), reh’g en banc granted, opinion vacated (Aug. 4, 2017), on reh’g en banc, 877 F.3d 297 (7th Cir. 2017), and rev’d, 877 F.3d 297 (7th Cir. 2017).]

\(^{40}\) [See Avery, 2011 WI App 124, ¶¶ 7, 30.]

\(^{41}\) [See id. ¶ 30.]


\(^{43}\) See id. at 2.

\(^{44}\) [See Avery, 2011 WI App 124, ¶ 4.]

\(^{45}\) [See Dassey v. Dittman, 201 F. Supp. 3d 963, 969 (E.D. Wis. 2016), aff’d, 860 F.3d 933 (7th Cir. 2017), reh’g en banc granted, opinion vacated (Aug. 4, 2017), on reh’g en banc, 877 F.3d 297 (7th Cir. 2017), and rev’d, 877 F.3d 297 (7th Cir. 2017).]

\(^{46}\) [See February Interview, supra note 21. Although the homicide occurred in Manitowoc County, the case was assigned to Calumet County due to a conflict of interest. See Defendant’s Statement on Planted Blood at 17–18, State v. Avery, No. 2005-CR-381 (Wis. Cir. Ct., Manitowoc Cty. Jan. 17, 2007), http://www.stevenaverycase.org/wp-content/uploads/2016/01/Defendants-Statement-on-Planted-Blood.pdf. Avery had sued Manitowoc County for wrongful conviction in a previous sexual assault case, which was still pending at the time of the homicide. See Avery v. Manitowoc Cty., 428 F. Supp. 2d 891, 893 (E.D. Wis. 2006). Soon after Avery was charged, the county settled. See id.]

\(^{47}\) [See State v. Dassey, 2013 WI App 30U, ¶ 3, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam).]
On March 1st, Wiegert and Fassbender met Brendan at school and told him they wanted to “interview” him some more at the local police station, again with his mother’s permission. Based on this confession to Wiegert and Fassbender, Brendan was charged as a party to the crime of homicide. The confession was the primary evidence against him.

Pretrial counsel Len Kachinsky filed a motion to suppress on the grounds that Brendan’s statement was not voluntary. The school psychologist testified that Brendan has documented cognitive and learning deficits. After hearing the testimony, and watching a recording of the March 1st interrogation, the court denied the motion, finding that the confession was voluntary. In its decision, the court made twelve findings of fact about Brendan’s behavior and characteristics and law enforcement conduct. As will be discussed in Part VIII, in these findings, and the resulting conclusions of law, the trial court demonstrated little awareness of the subtleties of Brendan’s communication, developmental, and cognitive issues, even less awareness of the subtleties of Wiegert and Fassbender’s communication, and absolutely no recognition of how the combination would have affected the interrogation.

48 See id.
49 See Dassey, 201 F. Supp. 3d at 970, 975; February Interview, supra note 21; March Interview, supra note 21.
50 See id. at 975.
52 See Transcript of Motion Hearing, supra note 28, at 3. Kachinsky stipulated that Brendan was not in custody, which meant Miranda was not an issue. See State v. Dassey, No. 06-CF-88, slip op. at 11 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006). The trial court ruled that even if Miranda had been raised, the requirements of a knowing, intelligent, and voluntary waiver had been met. See id. at 11–12.
53 See Transcript of Motion Hearing, supra note 28, at 89–91.
54 See Dassey, slip op. at 11. Wisconsin law on voluntariness is identical to federal law. See State v. Jerrell C.J., 2005 WI 105, ¶ 18, 283 Wis. 2d 145, 699 N.W.2d 110 (“[A] defendant’s statements are voluntary ‘if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant’s ability to resist.’”) (quoting State v. Hoppe, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407).
55 See Dassey, slip op. at 3–10.
56 See, e.g., Dassey v. Dittman, 877 F.3d 297, 336 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting) (“No reasonable state court, knowing what we now know about coercive interrogation techniques and viewing Dassey’s interrogation in light of his age, intellectual deficits, and manipulability, could possibly have concluded that Dassey’s confession
Brendan went to trial. Trial counsel sought to show that Brendan’s confession was unreliable and inherently false. Again, the school psychologist testified, as did an expert on suggestibility. Brendan himself testified, haplessly trying to explain how he came to confess to a crime he said he did not commit. The jury convicted him.

On appeal the central issue was the voluntariness of Brendan’s confession to Wiegert and Fassbender. Appellate counsel first proceeded under a Wisconsin post-conviction statute that allows a defendant to return to the trial court to supplement the record before proceeding with an appeal. At the hearing on the post-conviction motion, counsel presented Dr. Richard Leo, who testified at length regarding the science of false confessions. Dr. Leo also testified about Wiegert and Fassbender’s coercive techniques and Brendan’s vulnerability to those techniques because of his age and intellectual limitations. A central point of contention was the number of times that Wiegert and Fassbender contaminated the interview by directly feeding facts which were then parroted back by Brendan. The motion was denied. The court reaffirmed its original findings and

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58 See Dassey, 2013 WI App 30U, ¶ 1, 4.
59 See Transcript of Trial (Day 6), supra note 27, at 71; Transcript of Trial (Day 8) at 4, 56, State v. Dassey, No. 06-CF-88 ( Wis. Cir. Ct., Manitowoc Cty. Apr. 24, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c87f56902b07a976af0fbc5a9a06/1452485392481/dassey_4_24_07.pdf. According to Dr. Gordon’s testimony, Brendan’s impaired intellectual functioning, learning disabilities, and psychological profile made him highly suggestible, especially when presented with leading questions and pressure. See Transcript of Trial (Day 8), supra at 56.
61 See Transcript of Trial (Day 9) at 159–60, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c87f56932b1ca976af0fbc5a9a80/1452485410073/dassey_4_25_07.pdf.
66 See State v. Dassey, No. 06-CF-88, slip op. 1, 32 (Wis. Cir. Ct., Manitowoc Cty. Dec. 13,
bolstered those findings with the strength of the case.\textsuperscript{68}

The Wisconsin Court of Appeals affirmed the trial court ruling in a short twenty-three paragraph opinion.\textsuperscript{69} In the brief two paragraphs that analyzed the circumstances of the interrogation and confession, the court adopted the trial court’s findings wholesale:

The trial court heard the testimony of Dassey’s mother, his school psychologist and a police interviewer, and had the benefit of listening to the audiotapes and viewing the videotaped interviews. The trial court found that Dassey had a “low average to borderline” IQ but was in mostly regular-track high school classes; was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning. The court also found that the investigators used normal speaking tones, with no hectoring, threats or promises of leniency; prodded him to be honest as a reminder of his moral duty to tell the truth; and told him they were “in [his] corner” and would “go to bat” for him to try to achieve a rapport with Dassey and to convince him that being truthful would be in his best interest. The court concluded that Dassey’s confession was voluntary and admissible.

The [trial] court’s findings are not clearly erroneous.\textsuperscript{70}

The Wisconsin Supreme Court declined to take review.\textsuperscript{71}

Attorneys then filed a petition for habeas corpus in the Eastern District of Wisconsin.\textsuperscript{72} In a lengthy opinion, Magistrate Judge Duffin examined the confession in light of the conduct of Wiegert and Fassbender and their “highly leading questions.”\textsuperscript{73} “[T]he court acknowledge[d] significant doubts as to the reliability of Dassey’s

\textsuperscript{68} See id. at 20–22.
\textsuperscript{69} See \textit{Dassey}, 2013 WI App 30U.
\textsuperscript{70} \textit{Id.} ¶¶ 6–7, 2013 Wisc. App. LEXIS 85, at *2 (emphasis added).
\textsuperscript{71} See \textit{State v. Dassey}, 2013 WI 82U, ¶ 1, 350 Wis. 2d 703, 839 N.W.2d 866.
\textsuperscript{72} See \textit{Dassey v. Dittman}, 201 F. Supp. 3d 963, 985 (E.D. Wis. 2016), \textit{aff’d}, 860 F.3d 933 (7th Cir. 2017), \textit{reh’g en banc granted, opinion vacated} (Aug. 4, 2017), \textit{on reh’g en banc}, 877 F.3d 297 (7th Cir. 2017), \textit{and rev’d}, 877 F.3d 297 (7th Cir. 2017).
\textsuperscript{73} See \textit{id.} at 998.
confession,” but also acknowledged that as a constitutional matter, reliability is for the jury, not for a court ruling on voluntariness. The court went on, however, to find that, looking at “the totality of the circumstances,” including Brendan’s age, lack of familiarity with the criminal justice system, lack of a parent present, Wiegert and Fassbender’s paternalistic and exploitive behavior, and promises of leniency, Brendan’s confession was involuntary, and the case was remanded.

That decision was subsequently reversed by an en banc panel of the Court of Appeals in December 2017. In the 4-3 decision the Court found that despite its “relative brevity,” the state court of appeals’ terse two-paragraph endorsement of the trial court findings was sufficient to satisfy the reasonableness standard of 28 U.S.C. § 2254(d), and that the federal courts were therefore required to defer to the state court findings. There were two strongly worded dissents. The first, by Chief Judge Diane Wood began:

[A] writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Psychological coercion, questions to which the police furnished the answers, and ghoulish games of “20 Questions,” in which Brendan Dassey guessed over and over again before he landed on the “correct” story (i.e., the one the police wanted), led to the “confession” that furnished the only serious evidence supporting his murder conviction in the Wisconsin courts.82

The Supreme Court denied certiorari on June 25, 2018.83

II. WHY A SPEECH-LANGUAGE PATHOLOGIST?

An unusual feature of this project is that it pairs a law professor with a speech-language pathologist (SLP), a profession not commonly seen, or well understood, in the criminal or juvenile justice systems. While it is fairly well known that SLPs are the professionals who work with children who have difficulties with s’s, l’s and r’s, or who stutter, people unfamiliar with the field may be surprised at the full breadth of SLPs’ professional activities, expertise, and services.84 The full scope of practice includes all aspects of communication, across the full lifespan from infants, toddlers, pre-school and school-age children, and adolescents, to adults of all ages.85 Language development and disorders have long been primary areas of expertise for SLPs, and “[n]o other profession holds this expertise.”86

SLPs work predominantly with clients who have delays or disorders many of which occur, as with Brendan, developmentally (i.e., not the result of illness or trauma).87 SLPs provide screening and discourse analysis to identify potential communication problems, full-scale evaluation and diagnosis, intervention/therapy services, counseling, and education for clients and their families, educators and other providers.88

82 Dassey, 877 F.3d at 319 (Wood, C.J., Rovner, J., Williams, J., dissenting).
85 See id.
88 See Speech-Language Pathologists: About Speech-Language Pathology, supra note 84.
In other words, an SLP is well-suited for involvement in criminal cases where a juvenile or adult has a suspected, or already diagnosed, language deficit. Just like Sherlock Holmes, a good SLP’s business is “to know what other people don’t know” and to observe what others cannot see. A good SLP will see under the surface into the underlying interconnected complexities of the communication and cognitive systems and understand the significance of developmental processes.

Seeing beneath the surface is especially important in this case, because so much was decided, or overlooked, based on the appearance of things. Brendan appeared to be functioning well in the interview; he appeared to understand; he appeared to agree to so much of what the police said. The police appeared to be calm, appeared to be gentle, and appeared to be just asking the kid some questions as he sat on a comfortable couch. No one bothered to go under the hood because they thought they knew; they thought they could rely on common sense, but they did not recognize their own ignorance. They clearly did not know that their common sense would not serve in this situation. Once again, Sherlock says it best: “You did not know where to look, and so you missed all that was important.”

Unlike many forensic psychologists who address mental and behavioral functioning, an SLP is trained to go beyond generalities about communication problems and can correct the kind of misconceptions that occurred in this case. An SLP can provide a detailed description of the deficits, whether it is processing, verbal memory, or narrative, and what those deficits mean in actual communication situations. The SLP can offer insights about an

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90 See, e.g., Dassey v. Dittman, 877 F.3d 297, 307 (7th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 2677 (2018) (providing an example of Brendan nodding in agreement to what the police officers said).
91 See id. at 306.
92 2 A. CONAN DOYLE, A Case of Identity, in The Adventures of Sherlock Holmes, supra note 89, at 56, 66.
93 For example, Brendan was evaluated by Dr. Robert Gordon who found that Brendan was very passive, fearful of social situations, and highly suggestible. See Trial Exhibit 231, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Letter from Robert H. Gordon, Ph.D., Licensed Psychologist, Forensic Psych Associates, Ltd., to Mark R. Fremgen, Kindt Phillips Friedman & Fremgen, S.C. (Nov. 15, 2006)), http://www.stevenaverycase.org/wp-content/uploads/2016/01/Trial-Exhibit-231-Brendan-Dassey-Psych-Evaluation-11-10-2006.pdf. There was no discussion of Brendan’s communication issues, though his personality and behavioral characteristics are consistent with Brendan’s severe language deficits. See id.
individual’s non-verbal communication and the connection between an individual’s language deficits and behavior.\textsuperscript{95} Equally important, the SLP can analyze the communication of other persons who interacted with the impaired individual.\textsuperscript{96} This can be critical when, as here, the verbal and non-verbal communication of the other people in the conversation—i.e., law enforcement—matters as much as the communication of the impaired person.

III. LANGUAGE IMPAIRMENTS: A PRIMER

That Brendan had a severe language impairment that profoundly interfered with his functioning is incontrovertible.\textsuperscript{97} Unfortunately, few people in the Manitowoc County Courthouse seemed to have even noticed. To be fair, Manitowoc is hardly unique. We therefore feel that an overview of language impairments is in order before turning to Brendan.

A. Language Impairments: What Are They?

Language is an organized system governed by rules and conventions that speakers follow without knowing it.\textsuperscript{98} Language is a powerful tool comprised of three large domains: form, meaning, and use.\textsuperscript{99} It has a significant non-verbal dimension and integrates cognitive systems such as attention, memory, problem solving, executive functioning, and social-emotional skills.\textsuperscript{100} Despite all of its power, however, the process of acquiring language in early childhood can be easily disrupted by a number of physiological, psychological, and environmental forces.\textsuperscript{101} When that happens, the resulting

\begin{footnotes}
\item[96] See Speech-Language Pathologists About Speech-Language Pathology, supra note 84.
\item[97] Dassey v. Dittman, 860 F.3d 933, 972 (7th Cir. 2017) (describing Brendan’s characteristics and limitations), reh’g en banc granted, opinion vacated (Aug. 4, 2017), on reh’g en banc, 877 F.3d 297 (7th Cir. 2017), cert. denied, 138 S. Ct. 267 (2018).
\item[99] See Form, Meaning, and Use, REALGRAMMAR, https://www.realgrammar.com/form-meaning-use/ (last visited Feb. 25, 2019).
\item[101] See, e.g., LaVigne & Van Rybroek, supra note 18, at 49, 51.
\end{footnotes}
impairment can be devastating and life-long.\textsuperscript{102}

The term “language impairment” (also known as “language disorder”)\textsuperscript{103} generally refers to deficiencies in language competency. It encompasses weaknesses in three realms of spoken language—expressive, receptive, and pragmatic.\textsuperscript{104}

Expressive and receptive (comprehension) deficits affect vocabulary, syntax, semantics, and processing.\textsuperscript{105} These skills are directly related to the ability to decipher meaning and to adequately recall and relate information.\textsuperscript{106} According to the Royal College of Speech and Language Therapists (U.K.), lack of these vital communication skills “results in poor knowledge, processing and application of culturally relevant and often quite subtle behavior that assists in establishing and maintaining relationships of varying degrees of complexity.”\textsuperscript{107}

Pragmatic deficits relate to “the behavioral effects[] of communication.”\textsuperscript{108} Deficiencies in this aspect of language reveal themselves in “a lack of social cognition, an inability to take the perspective of the other person, and a failure to appropriately adapt

\textsuperscript{102} See id. at 48–49.

\textsuperscript{103} We use the term “language impairment” because that is the term used in the school SLP’s language evaluation report. See Trial Exhibit 219, \textit{supra} note 19. Many different terms are in use currently, such as developmental language disorder, communication disorder, language delay, and specific language impairment, to name just a few. Recently, there has been an effort to reach a consensus on terminology. The debate is ongoing among clinicians and researchers and there is much disagreement. See, e.g., Dorothy V.M. Bishop et al., \textit{Phase 2 of CATALISE: A Multinational and Multidisciplinary Delphi Consensus Study of Problems with Language Development: Terminology}, 58 J. CHILD PSYCHOL. & PSYCHIATRY 1068, 1068–71 (2017); Courtenay Frazier Norbury & Edmund Sonuga-Barke, \textit{New Frontiers in the Scientific Study of Developmental Language Disorders}, 58 J. CHILD PSYCHOL. & PSYCHIATRY 1065 (2017); see also Nancy Volkers, \textit{Diverging Views on Language Disorders: Part One of Two}, \textit{ASHA LEADER}, Dec. 1, 2018, at 47, 48, 50 (arguing the term specific language impairment (SLI) should be abandoned for developmental language disorder (DLD)).

\textsuperscript{104} Language impairments also exist among users of signed languages. See Michele LaVigne & McCay Vernon, \textit{An Interpreter Isn’t Enough: Deafness, Language, and Due Process}, 2003 WIS. L. REV. 843, 853, 856 (2003). However, because Brendan is hearing, and uses spoken language, and because the vast majority of linguistically impaired individuals in the criminal justice system are also hearing and use spoken language, we refer to oral and spoken language competency.

\textsuperscript{105} These are tested in part by standardized instruments. See LaVigne & Van Rybroek, \textit{supra} note 17, at 74; see also STEVEN PINKER, \textit{THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE} 380 (2007) (discussing expressive communication’s value in social settings).

\textsuperscript{106} See LaVigne & Van Rybroek, \textit{supra} note 17, at 75–76.

\textsuperscript{107} See COLES ET AL., \textit{supra} note 100, at 5.

\textsuperscript{108} LaVigne & Van Rybroek, \textit{supra} note 17, at 75 (alteration in original); see also Robert L. Russell, \textit{Social Communication Impairments: Pragmatics}, 54 PEDIATRIC CLINICS N. AM. 483, 484 (2007) (“[Pragmatics can be defined as] the communicative use of language and gesture in context . . . .”).
Individuals with pragmatic issues often lack “the ability to accurately process a face to face interaction . . . [and have difficulty] processing non-verbal content as well as verbal content.” Developmental language impairments are the result of disruption in a child’s language acquisition process. The causes can be an underlying communication disorder such as hearing loss, auditory processing disorder, an underlying cognitive deficit, or external conditions such as extreme poverty, trauma, abuse or neglect. Language impairments will also co-occur with associated disorders such as ADHD, learning disability, or pervasive developmental disorder.

Language impairments rarely exist in isolation. Because language is so essential to human functioning, communication deficits invariably give rise to cognitive, social, academic, behavioral, and/or emotional difficulties. Any one of these can have a profound influence on an individual’s ability to effectively navigate through life, even after the individual has acquired enough language to get by in daily living or to appear “normal.” In fact, although language impairment is often classified as a childhood disorder, a child does not grow out of it. The effects and deficits will typically continue into late adolescence and adulthood.

B. Language Impairments in the Justice System

It should come as no surprise that people with language

109 LaVigne & Van Rybroek, supra note 17, at 75.
110 COLES ET AL., supra note 100, at 5.
111 See LaVigne & Van Rybroek, supra note 17, at 75–76.
112 See id. at 76.
113 See Johnson et al., supra note 17, at 52; LaVigne & Van Rybroek, supra note 18, at 55.
impairments do not fare well in the criminal or juvenile justice systems.\textsuperscript{116} In a previous article, co-author Michele LaVigne described the many collateral consequences of language impairment that impede, or even destroy, an individual’s ability to receive due process and effectively participate in the criminal justice system, whether it be working with counsel or facing a high-stakes interrogation.\textsuperscript{117} The list is long: poor vocabulary; difficulty processing complex sentences and paragraph length utterances; deficient auditory memory; poor narrative skills; inability to grasp inferences; lack of background knowledge; difficulty learning new material; and limited ability to seek clarification.\textsuperscript{118}

This is not to suggest that every person with a language impairment will be disabled or disadvantaged in all aspects of communication. Nor will the deficits necessarily be readily apparent or recognizable, as will be discussed below. Nevertheless, there is no question that language impairments or disorders can, and do, strike directly at the heart of justice for the impaired individuals who come into juvenile or criminal court.\textsuperscript{119}

The effects of language impairments take on even greater urgency when we consider that individuals with language impairments are arrested, convicted, and incarcerated at rates well beyond the impairment rates found in the general population.\textsuperscript{120} Language impairments occur in approximately 7\% of the population,\textsuperscript{121} but

\begin{itemize}
\item[\textsuperscript{116}] See LaVigne & Van Rybroek, supra note 18, at 43–44.
\item[\textsuperscript{117}] See id. at 66.
\item[\textsuperscript{118}] LaVigne & Van Rybroek, supra note 17, at 77–78; see LaVigne & Van Rybroek, supra note 18, at 43–44; Gerard H. Poll et al., Identification of Clinical Makers of Specific Language Impairments in Adults, 53 J. SPEECH, LANGUAGE, & HEARING RES. 414, 417–19 (2010); Pamela C. Snow & Martine B. Powell, Oral Language Competence, Social Skills and High-Risk Boys: What Are Juvenile Offenders Trying to Tell Us?, 22 CHILD. & SOCY 16, 22, 24 (2008).
\item[\textsuperscript{119}] See LaVigne & Van Rybroek, supra note 18, at 42.
\item[\textsuperscript{120}] See Coles et al., supra note 100, at 13–16 tbl.; Theresa A. Belenchia & Thomas A. Crowe, Prevalence of Speech and Hearing Disorders in a State Penitentiary Population, 16 J. COMM. DISORDERS 279, 281–83 (1983) (finding higher rates of voice and hearing disorders in the incarcerated population than in the general population); Nicholas Bountress & Jacqueline Richards, Speech, Language and Hearing Disorders in an Adult Penal Population, 44 J. SPEECH & HEARING DISORDERS 293, 298 (1979) (finding a high incidence of deficient language skills in an adult male prison population); Davis et al., supra note 18, at 252 (indicating that between 58\% to 84\% of institutionalized delinquents had language and communication difficulties); LaVigne & Van Rybroek, supra note 17, at 70–71; Dixie Sanger et al., Prevalence of Language Problems Among Adolescent Delinquents: A Closer Look, 23 COMM. DISORDERS Q. 17, 23 (2001) (explaining that 19.4\% of female juvenile delinquents studied qualified for language services); Snow & Powell, supra note 118, at 22 (indicating that 52\% of young male offenders studied had a language impairment); Cynthia Olson Wagner et al., Communicative Disorders in a Group of Adult Female Offenders, 16 J. COMM. DISORDERS 269, 274 (1983) (revealing that 44\% of incarcerated women studied had some form of speech-language deficiency).
\item[\textsuperscript{121}] Coles et al., supra note 100, at 6–8.
\end{itemize}
studies of juvenile and adult correctional facilities in the United States and the U.K. have found rates of language impairment that are three to ten times higher.\textsuperscript{122} British researchers have estimated that 50-60\% of young offenders (21 or younger) have “speech, language and communication needs.”\textsuperscript{123} Two studies of adolescent boys charged with “homicidal behavior” (attempted or completed homicides) in New York and Florida found that every one of them had a diagnosable “language disorder and all scored well below their actual age[s] in language” measures.\textsuperscript{124}

C. Why Don’t We Know This?

So, if language impairments can be so devastating to human development and have the potential to wreak havoc on due process, and if so many of the people who cycle through our criminal and juvenile justice systems have these impairments, why don’t we know about this? Why are language impairments not common knowledge among criminal and juvenile law professionals? And in the context of Brendan’s case, why did the police, pre-trial counsel, and the judge not know that he suffered from a severe multi-faceted language impairment that reached the level of disability? Especially when the documentation of the impairment was right in front of their faces?

That, as they say, is the million-dollar question. And, as is true for so many high-priced questions, the answer is complicated.

The legal profession is not alone in its ignorance of language impairments. Despite decades of robust research, language impairments still remain relatively unknown outside of the speech-language profession, especially in the United States.\textsuperscript{125} And, despite the fact that language impairments occur more frequently than other

\textsuperscript{122} See supra note 120. See also LaVigne & Van Rybroek, supra note 18, at 93–94 (finding the rate of diagnosed learning disabilities is almost three times more than general public); Kathryn Stone & Karen Bryan, Unlocking the Evidence, COUS. MAG. (Oct. 2010), https://www.counselmagazine.co.uk/articles/unlocking-the-evidence (finding that at least 60\% of young offenders have communications difficulties).


\textsuperscript{124} LaVigne & Van Rybroek, supra note 18, at 95–96; see Charles H. King, The Ego and the Integration of Violence in Homicidal Youth, 45 AM. J. ORTHOPSYCHIATRY 134, 136 (1975) (studying adolescent boys with homicidal behavior in New York); Wade C. Myers & P. Jane Mutch, Language Disorders in Disruptive Behavior Disordered Homicidal Youth, 37 J. FORENSIC SCI. 919, 921 (1992) (studying adolescent boys with homicidal behavior in Florida)

\textsuperscript{125} The bulk of research on the subject comes from Canada, Australia, and the U.K. See COLES ET AL., supra note 100, at 13–16 tbl.
well-known disorders, there is little public awareness. A common refrain among speech-language professionals is that language impairments are the most common childhood disorder the public has never heard of.

One of the primary reasons for this anonymity is that language impairments are hidden. Unless an individual also has an articulation (speech production) disorder, language impairment will often not look like anything we recognize as a disorder. Instead, the impaired individual may appear as a person of few words—or odd words. And, this may be accompanied by excessive passivity, reluctance, or abruptness, which will simply be written off as personality traits. Or in many instances, as a behavior problem. Meanwhile, as an impaired child grows into adolescence and adulthood, he or she will learn to “pass” by developing techniques for masking communication deficits.

It is also likely that the general public and the legal profession never paid attention to language impairments because we never had to. For most of us, especially the verbal types drawn to law, language simply showed up. Language is, as linguist Noam Chomsky put it, “something that happens to you; it’s not something you do.” But, while that may make our lack of awareness understandable, it does not mitigate the harm caused by that ignorance.

IV. THE SCIENCE OF INTERVIEWING

Another area of profound ignorance among the players in Brendan’s case was the science of interviewing. From looking at the record, it appears that law enforcement, pre-trial counsel, and the judge knew that open-ended questions were good and leading

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127 See, e.g., id.
129 See LaVigne & Van Rybroek, supra note 17, at 78.
131 See LaVigne & Van Rybroek, supra note 17, at 78; Snow & Powell, What’s the Story?, supra note 114, at 248; Snow & Powell, Youth (In)Justice, supra note 114, at 2.
132 NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 173–74 (1988)).
questions were bad, but they had courtroom notions of open-ended and leading questions. Beyond that, no one seemed to appreciate the complicated dynamics of interviewing, especially of an adolescent with a severe language disability. That lack of understanding followed Brendan up through the en banc panel in Chicago and played a major role in the way the case turned out. For that reason, we believe that an overview of interviewing principles is as essential as the discussion of language impairments.

A. General Principles and Best Practices

Interviewing is a multi-faceted subject that commands its own graduate-level courses. As we will discuss below, decades of research have produced consensus about best practices for interviewing an impaired juvenile like Brendan, or for that matter, anybody. When we analyzed the interviews with Brendan, we did so through the lens of those best-practices.

Interviewing is sophisticated, complicated business that requires specialized training, knowledge, practice, and ongoing review and assessment. The interview is a critical tool for professionals in a number of fields—medical, therapeutic/clinical, and forensic—all of which recognize that a well-done interview is essential to case success, and that a poorly done interview is a recipe for disaster. Extensive research has resulted in recommendations for evidence-based best-practices that are similar across professions, including law enforcement. These practices reflect the recognition that interviewers’ behavior and language have a direct effect on the


interviewee’s language and thus on quality of the information provided. Experts have identified verbal behaviors that elicit the most accurate and complete content possible on the one hand, and on the other, behaviors to be avoided because they are contaminating, suggestive, and/or narrow the interview’s focus too early in the process.

When the person being interviewed is a child or an individual with any kind of cognitive or developmental delay, the need for best-practices becomes even more urgent. Because of their underdeveloped language skills, these individuals are at greater risk for providing inaccurate information in response to memory cues or prompts. This, coupled with well-documented desire to say what they think the interviewer wants to hear makes interviews with these individuals both high-risk and high-stakes.

The risk is further complicated by the malleable nature of memory, i.e., memories can be “updated” each time they are accessed. If memories are repeatedly accessed by inappropriate or carelessly executed verbal prompts, they can be easily corrupted.

The first step to an accurate interview with any type of vulnerable individual happens before the interview ever starts. Pre-interview preparation and information gathering about the person to be interviewed are imperative. Speaking with teachers or parents and accessing records inform the interviewer about potential conditions that may affect participation in an interview.

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136 This is part of speech language pathologists’ training. See, e.g., Geralyn R. Timler, Using Language Sample Analysis to Assess Pragmatic Skills in School-Age Children and Adolescents, PERSP. ASHA SPECIAL INT. GROUPS, Jan. 2018, at 23, 31. It is also the basis for research studying effective interviewing with children by Lamb and colleagues in four different countries. See, e.g., Lucy A. Henry et al., Children with Intellectual Disabilities and Developmental Disorders, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE, supra note 135, at 255, 261; Lamb et al., supra note 133, at 1204–05.

137 See Lichstein, supra note 133, at 31; Yael Orbach & Margaret-Ellen Pipe, Investigating Substantive Issues, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE, supra note 135, at 149, 150–51, 158.

138 See Lichstein, supra note 133, at 31; Orbach & Pipe, supra note 137, at 159–60.

139 See POOLE, supra note 133, at 15.


141 See Elizabeth Loftus, The Malleability of Human Memory: Information Introduced After We View an Incident Can Transform Memory, 67 AM. SCIENTIST 312, 312 (1979).

142 POOLE, supra note 133, at 15.

143 See POOLE, supra note 133, at 16.


145 See id.; Christina Rainville, Best Practices for Interviewing Children with Disabilities,
The interview itself is ideally conducted as soon as possible after the event, and in a distraction-free, comfortable environment. The interviewer begins by establishing genuine rapport.

The next phase, known as information elicitation, is the heart of the interview. This is the place where adherence to the evidence-based procedure is essential. Interviews conducted systematically, adhering to the procedure, and with an understanding of language use and its reciprocal nature, produce information that is substantially more reliable and complete.

One of the keys to a good interview is the interviewer’s understanding of the kind of communication she should aim for, both from herself and the person being interviewed. In an information-seeking interview, the interviewer’s role is to encourage the interviewee to provide information in the form of freely recalled narratives. A narrative is an account of events occurring over time; minimally, a narrative can take the form of a single complex sentence or several simple consecutive utterances. A narrative that is freely recalled unfolds “in the most unbiased, uninfluenced way possible.” It is not suggested or directed by another person. The person who experienced it tells the story.

As would be expected, questions are the tools of the professional interviewer, but not all questions are created equal. Interviewers need an awareness of the characteristics of questions and how to

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146 See Lamb et al., supra note 133, at 1203.
147 An optimal furniture arrangement allows eye contact as well as looking away during times when one is recalling events and formulating thoughts. See Flynn, supra note 135, at 266.
149 See, e.g., Rainville, supra note 145.
150 See U.S. DEP’T OF JUST., supra note 144, at 12.
152 See LaVigne & Van Rybroek, supra note 17, at 88, 106–07; see also Dana K. Cole, Psychodrama and the Training of Trial Lawyers: Finding the Story, 21 N. Ill. U. L. REV. 1, 6–7 (2001) (explaining the psychodrama method for trial attorneys, which requires attorneys to explain the facts on an emotional level).
153 See, e.g., February Interview, supra note 21 (“I got off the bus at 3:45 and I walked, I seen a jeep down by our house and I went into my house and I went Playstation 2 for two hour, three hours.”).
154 See Flynn, supra note 135, at 268.
155 See Lamb et al., supra note 133, at 1203; Snow & Powell, Youth (In)justice, supra note 114, at 2.
Certain questions or the repeated use of particular types of questions may have effects that the interviewer does not intend such as introducing inaccuracies or omitting important content.\textsuperscript{157}

Experts universally agree that open-ended questions are the best tool for eliciting narrative.\textsuperscript{158} Open-ended questions consist of little or no content and carry the least risk of contamination.\textsuperscript{159} They may indicate a general topic or time period as in “Tell me what happened.” “Tell me what happened on x date or at x place.” It is important to note that these open-ended questions are not the same as the questions that lawyers and judges typically think of as open-ended.\textsuperscript{160}

Open-ended questions should be used to start the interview and should continue as the most-used questions throughout.\textsuperscript{161} The value and utility of these questions may not be readily apparent, precisely because they contain so little content.\textsuperscript{162} However, “[a]s soon as the first narrative is completed, the interviewer” has obtained freely generated material and the interviewer can ask for elaboration by using follow-up open-ended questions such as “Tell more about x (what the child said).”\textsuperscript{163}

When open-ended questions are exhausted, other questions containing more content can be used, such as wh-questions. Wh-Questions are formulated using the words “who,” “what,” “where,” etc.\textsuperscript{164} These questions have a narrow focus, such as a location or a person’s name, and can, if misplaced or overused, unintentionally elicit restricted and abbreviated responses. On the other hand, these questions are useful as follow-up.\textsuperscript{165}

\textit{Yes/No Questions}, of all the question types, contain the most

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{156} See Lamb et al., supra note 133, at 1203.
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See Sarah E. Agnew et al., An Examination of the Questioning Styles of Police Officers and Caregivers When Interviewing Children with Intellectual Disabilities, 11 LEGAL & CRIMINOLOGICAL PSYCHOL. 35, 37 (2006).
\item \textsuperscript{159} See Michael E. Lamb & Angèle Fauchier, The Effects of Question Type on Self-Contradictions by Children in the Course of Forensic Interviews, 15 APPLIED COGNITIVE PSYCHOL. 483, 483 (2001).
\item \textsuperscript{160} See, e.g., Orbach & Pipe, supra note 137, at 154–55 (providing examples of open-ended questions in children interviews).
\item \textsuperscript{161} See Lamb & Fauchier, supra note 159, at 484.
\item \textsuperscript{162} It may appear as if the interviewer is doing nothing! But questions are not vehicles for the interviewers to express themselves, they are tools used to give the interviewee the floor. With this type of question, the interviewer steps back and allows the interviewee to talk in an unrestricted, undirected way.
\item \textsuperscript{163} See Orbach & Pipe, supra note 137, at 154–55.
\item \textsuperscript{164} Wh-questions too may be syntactically formulated as a question, e.g., ‘Where did you go after school?’ or as a statement/request such as ‘We need to know where you went after school.’
\item \textsuperscript{165} See Orbach & Pipe, supra note 137, at 155; Lamb & Fauchier, supra note 159, at 489.
\end{enumerate}
\end{footnotesize}
content and carry the greatest risk of introducing content that the interviewee has not mentioned. Generally speaking, yes/no questions contain all the content that a declarative sentence contains. For example, “Did you go home after school?” contains the same content as the statement “you went home after school,” and adds a demand for confirmation or denial.

Multiple-choice questions are never acceptable. Ever. They are problematic for a number of reasons, and there is no productive use for these. The interviewee may interpret these as a forced choice (even if “none of the above” is the correct answer), or may select an inaccurate choice because they want to please the interviewer.

A visual representation of ideal proportions of question type and sequence would look something like a food pyramid, with open-ended questions (fruits and vegetables) leading the sequence and taking up almost two-thirds (Figure 1). Notice that yes/no questions are barely used, and there is no room whatsoever for multiple choice questions:

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166 See Orbach & Pipe, supra note 137, at at 156–57
168 See id.
169 An analogous example of forced choice can be seen in identification processes. In a consecutive photo line-up (i.e., sequential line-up), the witness views the suspect and fillers one at a time allowing the witness to answer “yes/no” to each individual viewed. In a simultaneous photo line-up, however, the suspect and fillers appear all at once. When a witness views a simultaneous line-up, (s)he is tempted to make a decision based on relative judgment by comparing one person to the next and choosing the “best” looking individual. See Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 Wis. L. Rev. 615, 619, 625–26 (2006); see also Wis. DEP’T OF JUST., OFFICE OF ATT’Y GEN., MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 4–5 (Apr. 1, 2010) (final draft), https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf (providing model policy and procedure for reliable eye-witness identification).
170 See Oxbourgh et al., supra note 167, at 60.
Throughout the process, the interviewer must engage in a process of double awareness. Obviously, the interviewer should be looking for signs of confusion or discomfort in the person being interviewed, but like so much about interviewing, recognizing these signs is not simply a matter of common sense. An adolescent with a language impairment may have learned to cover his lack of understanding with behaviors that the untrained interviewer would see as evasion, reluctance, dishonesty, or bad attitude.

Meanwhile the interviewer must also be constantly aware of, and reflecting on, her own behavior. Am I following the protocol? Am I consciously or unconsciously inserting content? What is the reaction of the interviewee? Am I encouraging the narrative or am I shutting it down? If so, how? And then the interviewer must adapt.

V. THE ANALYSIS: PROCESS AND METHODS

A. The Beginning

We started this project with a gut sense that there was more to the interrogations than met the courts’ eyes or ears. Though we come from different professional backgrounds, our professional interests

172 See Snow & Powell, Youth (In)justice, supra note 114, at 3.
173 See, e.g., Stewart et al., supra note 135, at 201.
overlap on the subject of language impairments and their potential for great damage. We both believed that an in-depth speech-language perspective could shed additional light on a tragic situation.

The first step—confirming Brendan’s language impairment—was easy. Ordinarily we would have had no access to any diagnosis or test results that occurred outside of the litigation context, and we would not presume to diagnose anybody from a TV show, but in this case the answer was hidden in plain sight—in the court record.

As a special education student, Brendan would have had an Individualized Education Plan (IEP) meeting at the beginning of every school year. Those records, including a speech-language assessment conducted by the school SLP on September 22nd and September 27, 2005, were admitted into evidence at trial. There was scant mention made of these records, especially the assessment, in the case, but as we will discuss below in Section VI, the scores and comments left no doubt that Brendan had a severe disability.

Meanwhile, we also obtained video or audio recordings of every interview or interrogation through an open records request. We reviewed them for critical information about non-verbal communication such as body language, tone of voice, and eye contact. We also reviewed them for intelligibility and significance to the case. Based on these reviews, we chose to have three interviews/
interrogations transcribed: November 5, 2005, the second interview of February 27, 2006, and March 1, 2006.

B. Transcribing the Interviews

The interviews were transcribed verbatim by a trained experienced transcriber and entered into a computerized language analysis software program, Systematic Analysis of Language Transcripts program (SALT).\(^\text{180}\) This is a tool that an SLP would ordinarily use to assess a client’s communication issues.\(^\text{181}\) It is important to note that a language analysis transcription is not like a court transcript;\(^\text{182}\) it provides detailed, coded information about the verbal and non-verbal conduct of the speakers beyond the words that are spoken.\(^\text{183}\)

Here, the transcriber followed standard conventions, which include indicating pauses of two seconds or more, and marking grammatical elements, overlapping speech, word omissions and errors with code.\(^\text{184}\) Prior to transcription we had observed that Brendan frequently responded non-verbally to police questions. We therefore requested additional coding to capture his gestures. When the process was complete, we were given a fully-coded transcription, which we used to generate our quantitative analyses.

C. Transcription Challenges: Law Enforcement

The transcriber faced considerable challenges transcribing the interviews, but not because of Brendan. Rather, the difficulty lay with the law enforcement officers, Wiegert and Fassbender. Both of them had speech that was rapid, with many run-on sentences and unfinished thoughts, making it difficult to interpret the thoughts

\(^{180}\) See Jon F. Miller et al., Transcribing Language Samples, in ASSESSING LANGUAGE PRODUCTION USING SALT SOFTWARE: A CLINICIAN’S GUIDE TO LANGUAGE SAMPLE ANALYSIS 31, 34 (Jon F. Miller et al. eds., 2d ed. 2015).

\(^{181}\) See Jon F. Miller et al., Tutorial: Using Language Sample Analysis to Assess Spoken Language Production in Adolescents, 47 LANGUAGE, SPEECH, & HEARING SERVS. SCHS. 99, 99 (2016).

\(^{182}\) See infra apps. 2, 3, for examples of SALT transcriptions.


expressed.\textsuperscript{185} Even though the transcribers are masters-level speech-language professionals, they had a hard time determining the boundaries of the police’s utterances (where one utterance ends and the next utterance begins)\textsuperscript{186} because their utterances were so disorganized.\textsuperscript{187} Wiegert and Fassbender’s thoughts were expressed unclearly and at times incoherently.\textsuperscript{188}

Ordinarily, when the transcribers are transcribing an interaction with a child with an impairment and an adult professional, it is the child with language impairment whose language presents the transcriber with the greatest challenge, because the child’s “intelligibility and prosody\textsuperscript{189} may be impaired.”\textsuperscript{190} In this case, however, it was the adult’s language that was the problem.\textsuperscript{191}

\textbf{D. Post-SALT Analysis}

After the SALT process was completed, we took a deeper look. We paid particular attention to the February 27th and March 1st interviews since these immediately preceded the charges, and the March 1st interview was the primary evidence against Brendan (and the subject of twelve years of litigation).

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\textsuperscript{185} See, e.g., February Interview, \textit{supra} note 21; March Interview, \textit{supra} note 21.

\textsuperscript{186} See March Interview, \textit{supra} note 21. An utterance is a production of one or more words that may or may not contain a main clause and is often identified by a speaker’s pauses or intonation; it may be a complete sentence, a fragment, a single word, or even a gesture. See Miller et al., \textit{supra} note 180, at 35–36; Miller et al., \textit{Analyzing Language Samples, in Assessing Language Production Using SALT Software: A Clinician’s Guide to Language Sample Analysis, supra} note 180, at 45. Clearly defined utterance boundaries allow for calculation of mean utterance length, which is a useful and widely used diagnostic measure of children’s language development. Mean utterance length of adult speakers in interaction with children is a valuable measure as well, and may, among other things, indicate the quality and quantity of their language relative to the child’s language level. Utterances segmentation is one of the most challenging decisions in any transcription process.

\textsuperscript{187} See March Interview, \textit{supra} note 21.

\textsuperscript{188} See \textit{id.}

\textsuperscript{189} Prosody refers to the variations in loudness, pitch, and duration in spoken language. Rising and falling pitch help listeners distinguish between questions, exclamations, and declarative sentences. Prosody is sometimes called the “melody of language” and is used to supplement the meaning of utterances by, for example, signaling emphasis, “affect, sarcasm, empathy, or the relation one holds to the person or audience being addressed.” Frank Boutsen, \textit{Prosody: The Music of Language and Speech, ASHA LEADER}, Mar. 4, 2003, at 6–8.

\textsuperscript{190} See Felicity Meakins et al., \textit{Understanding Linguistic Fieldwork} § 9.4 (2018).

\textsuperscript{191} See March Interview, \textit{supra} note 21, and \textit{supra} text accompanying note 186–88, for a discussion on how the law enforcement officers’ speech was difficult to interpret. In typical clinical and research contexts, the adults whose utterances are being recorded and transcribed in conversation with children with language impairment are often professionals skilled at monitoring both their own utterances and those of their partner simultaneously, and of controlling the pacing, complexity and clarity of their language. In many situations, the adult may follow loose guidelines, a protocol or even a script to aid them in maintaining these characteristics while eliciting children’s language.
Our analysis first differentiated between true questions and utterances that have the grammatical form of questions but do not function as true questions. For example, “Why don’t you have a seat?” is a question functioning as a polite way to tell someone to be seated, without expectation of a reply. This type of utterance was not considered as a question for our analysis. On the other hand, some utterances function as questions but do not have the grammatical question form. Examples include requests such as: “Tell me more about that.” This type was coded as an open-ended question and included in the analysis. True questions were categorized and coded into the following types: open-ended, wh- questions, multiple choice, and three forms of yes/no questions.\footnote{Some questions were ambiguous as to type. For example, “Do you remember when you went in the trailer?” is grammatically a yes/no question, but the police may have intended it to be taken as a wh- question such as “When did you go in the trailer?” In instances when the form was clear, but the intention was not, the grammatical form was used to determine the coding for question type.}

As part of this analysis, we re-transcribed several passages to allow us to more accurately analyze the confounding nature of Wiegert and Fassbender’s language usage. Additionally, we counted other instances where law enforcement used tactics that compromised the integrity of the interview. These include speaking in paragraphs (i.e., four or more sentences or utterances in a turn), and asking three or more questions in rapid succession before giving Brendan an opportunity to answer.

Before we even began this project, it was obvious from viewing the interrogations that Wiegert and Fassbender’s methods of communicating with Brendan fell far below professional norms. Just how far below became painfully apparent when we examined our results.\footnote{See infra Section VII and app. 1.}

VI. ABOUT BRENDAN DASSEY

A. The Severity of His Language Impairment

As we said earlier, determining whether Brendan had a language impairment, and the extent of his disability, was the easy part for us. The September 2005 Speech/Language Report conducted by an SLP for the Mishicot Schools was sitting in the court file, along with other school records from Brendan’s 2005 IEP meeting.\footnote{See Trial Exhibit 218, supra note 176; Trial Exhibit 219, supra note 19; Trial Exhibit 220, supra note 176.}
The test results and the ancillary records were unequivocal: Brendan had profound disabilities (speech-language impairment and language-based specific learning disability), that centered on his communicative, language, and interconnected cognitive functioning, and those disabilities had been present probably since birth.

An individual’s language skills are in part evaluated by means of specialized instruments administered and interpreted by an SLP. In Brendan’s case, the school SLP used a common assessment tool, the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4).

CELF-4 includes a series of subtests... that measure a variety of essential communicative [functions] such as auditory comprehension and recall, ability to follow directions, and comprehension of social rules... CELF-4 [is] more finely tuned to the layers of language than measures [traditionally] relied on by courts such as Verbal IQ or clinical assessments.

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195 The deficits in Brendan’s cognitive functioning appear to be centered in the verbal realm. See Transcript of Trial (Day 6), supra note 27, at 79–80. According to school records and the testimony of the school psychologist, Brendan scored in the average or low average range on Math measures. Id. at 90–92. See also Individuals with Disabilities Education Act (IDEA) Regulations, 34 C.F.R. § 300.8(c)(10) (2018) (“Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, [or] spell . . . .”).

196 See Trial Exhibit 219, supra note 19.


198 See Trial Exhibit 220, supra note 176.

199 LaVigne & Van Rybroek, supra note 17, at 78–79. According to Australian psychologist Pamela Snow, SLPs do not rely on Verbal IQ as a measure of language skill:

One problem is that verbal IQ represents... quite “static” skills, and... it is unrealistic to reduce a wide variety of complex sub-skills down to one score. SLPs think in a number of dimensions—receptive language (comprehension) [versus] expressive language, and also look at a number of aspects of language—phonology (use of the sounds system in one’s language), semantics (vocabulary), syntax (sentence complexity), and pragmatics (the culturally determined set of social “rules” about how language is used). We... “dissect” language competence, which is why we use a number of different measures... One of the most important composite skills is narrative language—the ability to apply a “template” that enables the logical sequencing of novel information for a listener who is [naive] about events. This has obvious forensic implications, but a verbal IQ score would only have a modest correlation with narrative skill.

E-mail from Pamela Snow, former Assoc. Professor, Monash University-Australia (now Professor, LaTrobe University, Australia), to Michele LaVigne, Distinguished Clinical
The report of Brendan’s scores is a devastating document. It makes clear that Brendan’s overall impairment level was in the most severe range, and that at sixteen, he was functioning like much a younger child—test results ranged from five-years, eight-months to eleven-years, nine-months. His total language score placed him at the 1st percentile, indicating that 99% of kids his age understood and used language better than he did; most of them much, much better.

The chart below (Figure 2) shows Brendan’s scores and the severity of his impairment (note: though not the same as IQ, CELF-4 uses the same metrics as an IQ test: 100 is the mean or age average; 85 is one standard deviation below the mean; 70 is two standard deviations below the mean):

**Figure 2**

**Impairment levels for standard scores and percentile rank from Brendan Dassey’s Language Evaluation; CELF-4**

<table>
<thead>
<tr>
<th>Standard Score</th>
<th>Severity Level of Impairment</th>
<th>CELF subtests</th>
<th>Brendan's standard scores</th>
<th>Brendan's percentile rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>116+</td>
<td>No impairment/ above average</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>101-115</td>
<td>No impairment/ average</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>86-114</td>
<td>No impairment/average</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>78 – 85</td>
<td>Mild/marginal/borderline</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>70 – 77</td>
<td>Moderate/low range</td>
<td>Working Memory</td>
<td>75</td>
<td>5</td>
</tr>
</tbody>
</table>

Professor of Law, Univ. of Wis. Law Sch. (Aug. 11, 2011) (on file with co-author Michele LaVigne).

200 See Trial Exhibit 220, supra note 176.

201 See id.

Table References:
2 CELF-4 etc; Pearson etc.
3 Speech/Language Report, Mishicot Public Schools September 22, 27, 2005; Amy A. LaFave, MS CCC-SLP.

The bell curve below (Figure 3) shows Brendan’s scores in relation to other sixteen-year-olds, with the scores of 95% of sixteen-year-olds falling between 70 and 130:

Figure 3
The report and the commentary from other school records identified difficulties at the most basic level, such as participating in classroom activities, initiating conversation and asking for clarification when confused.203 Brendan spoke at a low volume with little variation in pitch, and his body language, such as eye contact and gesture was “minimal,” yet another aspect of communication that he was unable to use.204 The list of Brendan’s “strengths” identified by the school SLP is telling; it was limited to three things: intelligible speech, willingness to participate, and knowledge of familiar routines.205

This is not to say that Brendan had no language or could not communicate at all. He had foundational language skills, but they were grossly underdeveloped.206 That means he would have trouble processing a lot of talk coming at him in any context.207 He would fatigue easily and become cognitively overloaded.208 This would hit him especially hard at school.209 Brendan would be the kid in the classroom who is always lost, always “not getting it.” His low scores on such tests as recalling sentences and understanding spoken paragraphs show he would struggle to process and recall even the most common forms of classroom communication, lectures, and multi-step directions. Learning new vocabulary and concepts would be slow and onerous. Brendan’s special education teacher took note of deficits in verbal memory which affected “all areas of language.”210 Typical high school expectations such as taking notes, studying for tests, or taking exams would be beyond his reach without extraordinary assistance. Abstract spoken or written material, common at the high school level, would increase his comprehension difficulties. This is but a sample of the challenges that Brendan would have faced every day, year after year, during his school years and beyond.211

Reports from other teachers bear out the difficulties caused by

203 See id.
204 See id.
205 Id.
206 See id.
207 See id.
208 See id.
209 Brendan was acutely aware of this and reported his academic failures to policemen in the first interview on November 6, 2005, even though he was not asked directly about them. For example, Brendan: “My grades are bad though . . . . Three F’s.” Trial Exhibit 203, supra note 184, at 43, 46.
210 Transcript of Trial (Day 6), supra note 27, at 75.
211 See Vicki A. Reed, Adolescents with Language Impairment, in AN INTRODUCTION TO CHILDREN WITH LANGUAGE DISORDERS 169, 170–84 (Vicki A. Reed ed., 5th ed. 2018), for an overview of the characteristics of language impairment in adolescents and the impact on academic, social, economic, and personal life.
Brendan’s severe language deficit. While Brendan was in “regular classes” for some of the school day pursuant to federal law,212 this is not because he was capable of doing “regular” work.213 He was hopelessly behind and was, at best, a passive observer.214 The effect of Brendan’s language impairment on his academic achievement was summarized this way:

Brendan continues to demonstrate delays in his basic reading and reading comprehension skills. Brendan demonstrates a delay in classroom achievement in these areas and in information processing deficit in the area of manipulation (difficulties summarizing and interpreting information, difficulties inferring information, difficulties understanding multiple contexts). Brendan continues to demonstrate significant delays in his receptive and expressive language skills, memory, vocabulary, sentence comprehension, pragmatics, and areas of abstract language . . . . Brendan’s language delays impact him educationally and socially.215

These types of poor language skills would also be felt outside of an academic setting.216 His poor communication would interfere with establishing and maintaining interpersonal relationships.217 The test scores show that his interactions would be compromised at the most basic levels: knowing how to participate in conversation; reading others’ facial cues, tone of voice and body language. His scores on tests of figurative language and inference indicate his understanding of common elements of adolescent language such as slang and sarcasm,218 would be limited, and combined with poor conversational skills, would isolate him.219

By any measure, Brendan’s language scores and communication

213 In 2005, two of Brendan’s classes were in the “Resource Room.” Otherwise, he was “mainstreamed” with non-disabled students. Trial Exhibit 218, supra note 176.
214 See id.
215 See Trial Exhibit 219, supra note 19.
216 See Reed, supra note 211, at 178.
217 See id. at 171. Brendan attempted to express something of this in the first interview:

Det. Baldwin: “Yeah I know you’re scared, okay and I can appreciate it.”
Dassey: “Sometimes I get shy when I don’t know anybody.”

Trial Exhibit 203, supra note 184, at 46.
218 See Reed, supra note 211, at 188.
219 See id. at 172, 177.
skills are heartbreakingly poor, and the effects would have been staggering. Perhaps the most trenchant observation about Brendan’s situation came from a speech-language professional in Northern Ireland. When shown the SLP’s report, the former head of the Royal College of Speech and Language Therapists could only say “Crikey[.] This is appalling!”

B. What Does This Mean for Interviewing Brendan?

Given what we know about Brendan’s ability to cope verbally, it seems ludicrous to even contemplate letting him be questioned by law enforcement. Yet, Brendan could, in fact, have been effectively interviewed, if—and this is a big if—the person or persons doing the interviewing knew what they were doing. Even with his limited language ability, Brendan had enough of the basics to be able to tell his experiences and answer a skilled interviewer’s questions to fill in gaps in his narratives. However, Brendan’s language profile combined with his age means that an interviewer would have to adhere to a rigorous protocol that protects against contamination, confusion, and intimidation. Moreover, even with well-intentioned, well-trained interviewers, Brendan could not be left alone.

In any interview that deviated from protocol, however, we expect that Brendan would be defenseless, especially if that interview is in reality a high-pressure interrogation. Just as at school, he would be overwhelmed by too much verbiage. There would be much he would miss, he would constantly struggle to grasp what is being thrown at him, and he would quickly become cognitively overloaded. He could easily misread interrogators’ verbal and non-verbal signals. As the records show, he would not ask for clarification if he did not understand. Neither would he argue. Ultimately, in an exhausted act of self-preservation, he would be expected to simply go along.

C. Why Didn’t Anybody See This?

A brief perusal of Brendan’s school records makes it abundantly clear that his severe language deficiencies are a central part of who

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220 E-mail from Alison McCullough to Michele LaVigne, supra note 20.
221 See COLES ET AL., supra note 100, at 5.
222 See Trial Exhibit 218, supra note 176; Trial Exhibit 219, supra note 19. See also LaVigne & Van Rybroek, supra note 17, at 77 (explaining that individuals with language difficulties have an inability to seek clarification).
223 See Trial Exhibit 231, supra note 93, at 2; infra app. 2.
he is and how he operates.224 How is it then, that the words “language impairment” were never uttered? How is it that Brendan’s communication difficulties by any name barely received any mention at all during the pretrial or trial process?225

As noted in the evaluation, Brendan’s speech was intelligible (i.e., did not draw attention to itself).226 And, as the videos show, he could speak in complete, though short, sentences. On several occasions he strung short sentences together.227 He nodded repeatedly and did not admit to confusion.228 Without examining these behaviors further—i.e., through the lens of language deficit—some observers might (and did) mistakenly believe he could function competently in an interview situation.

And Brendan, like so many other impaired adolescents, would have developed strategies to hide his disability and avoid negative social evaluations.229 Depending on the individual, this can take a variety of forms.230 By all accounts, Brendan’s strategies appear to involve extreme compliance—agreeing to just about everything, trying to do what the person in authority wanted, pretending to understand, and rarely asking for clarification.231

Finally, we must return to the fact that most of the legal profession, just like most of the general public, has never heard of language impairments and does not know what they look or sound like.232

224 See Trial Exhibit 219, supra note 19.
225 Only Brendan’s trial attorney seemed to recognize that Brendan had communication problems. Unfortunately, he did not connect his language deficits with his behavior in the interrogation or with the verbal behavior of Wiegert and Fassbender. This would have required an expert. See Transcript of Trial (Day 6), supra note 27, at 75, 77, 79, 103; see also Transcript of Motion Hearing (Day 4), supra note 27, at 217, 218, 231, 232 (discussing Brendan’s communication issues four times).
226 See Trial Exhibit 220, supra note 176.
228 See, e.g., Audio Recording: Mark Wiegert & Tom Fassbender (Mar. 1, 2006), supra note 227; infra app. 2.
230 See id.
231 See id.; see, e.g., infra app. 2, app.3 (showing instances of Brendan agreeing with officers).
Which might be marginally acceptable if the legal profession did not, as happened throughout this case, fill in the blanks with its own world view. This case record, along with the show itself, is replete with judges and lawyers making assumptions about Brendan’s intentions and abilities, and those assumptions were wrong. For example, while it is true that Brendan answered questions, and spoke intelligibly in complete subject-verb-object sentences, those skills are not signs of verbal sophistication. These are language development milestones achieved between the ages of four and six. And no, Brendan did not show “signs of physical distress” while seated on a comfortable couch during the interrogation. He did not yell, swear, stomp out, or refuse to answer questions. He maintained a consistent flat affect and slumped posture throughout. But, if anybody had read through his school records, and perhaps asked a few questions, they would have known that these were hardly signs that he was not intimidated. It is more likely that he was trying to hide.

VII. THE INTERVIEW: ASSESSMENT AND ANALYSIS

When this project began, we thought most of the story would be about Brendan and his language impairment—how his serious limitations would make it difficult for him to express himself in an interview and how his poor comprehension would make it difficult to
understand much of what Wiegert and Fassbender said and asked him, and the potential consequences of anything he said.\textsuperscript{240} What we did not appreciate was the powerful force that would be exerted by Wiegert and Fassbender’s own language and language usage.

Although there is no perfect interview, even with rigorous training and review,\textsuperscript{241} the police in this case could hardly be further from best practice, or even acceptable practice.\textsuperscript{242} Even without the additional language and language impairment layers we are describing here, this interrogation is widely considered a textbook example of “what not to do” in interrogations involving juveniles and individuals with intellectual impairments.\textsuperscript{243} When we add in the language piece, this interview becomes an abomination.

\textit{A. Before the Interview}

The stage was set for law enforcement malpractice long before the interview ever began, starting with investigator training. Proficiency as an interviewer is not acquired from several training seminars or even from a weeklong session.\textsuperscript{244} It is an intense and on-going process. Yet, the chief investigator and interrogator, Mark Wiegert, testified that his training only consisted of the controversial Reid

\textsuperscript{240} We knew that Brendan’s test results showed severe problems understanding single sentences and paragraph-length spoken language. See Trial Exhibit 220, supra note 176.

\textsuperscript{241} Stewart et al., supra note 135, at 199–200, 211–12.

\textsuperscript{242} We acknowledge that they did observe some recommended practices—providing Brendan with a comfortable seat, a room without distractions, and maintaining a calm, unemotional tone.


\textsuperscript{244} The initial training for the investigative interview system (PEACE) used in the U.K., Canada, and Australia lasts up to eighteen days with extensive review, assessment, and supplemental training. See Mary Schollum, Bringing PEACE to the United States: A Framework for Investigative Interviewing, POLICE CHIEF, Nov. 2017, at 30, 32, 33, 34. See also \textit{infra} Conclusion (discussing information about the PEACE system).
technique seminar (which lasts one, three, or four days) plus several “other one-day seminars.” After that, he relied on his “own experience.” By any measure, this is hopelessly inadequate, not to mention dangerous. Even more alarming is the fact that Wiegert claimed to have developed his own hybrid technique. He proudly testified, “after you’ve done interviews for several years, um, you kind of develop your own style, I think, and you incorporate some things from different trainings that you attend.”

Wiegert and Fassbender approached this particular interview with a similar lack of rigor and standards. The correct practice for any high-stakes interview begins with preparation, which among other things requires that the interviewers learn about the person to be interviewed. That did not happen here, nor did Wiegert even believe that preparation was important. Wiegert and Fassbender knew almost nothing about Brendan when they questioned him for hours on February 27th and March 1st. Then, at some point, when Wiegert and Fassbender did obtain information, it was wrong. At trial, Wiegert testified that it never occurred to him that Brendan might have some cognitive limitations, he did not know he was in

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245 The Reid Technique begins with a Behavior Analysis Interview where the interviewer determines if the suspect is lying. If the interviewer believes the suspect is guilty, the interrogation begins. The interrogation consists of the following nine-step approach:

[A]n interrogator confronts the suspect with assertions of guilty (Step 1), then develops “themes” that psychologically justify or excuse the crime (Step 2), interrupts all efforts at denial (Step 3), overcomes the suspect’s factual, moral, and emotional objections (Step 4), ensures that the passive suspect does not withdraw (Step 5), shows sympathy and understanding and urges the suspect to cooperate (Step 6), offers a face-saving alternative construal of the alleged guilty act (Step 7), gets the suspect to recount the details of his or her crime (Step 8), and converts the latter statement into a full written confession (Step 9).


248 Id.

249 See id. at 8–9.

250 Id.

251 See Schollum, supra note 244, at 33.

252 See Motion Hearing Day 5, supra note 247, at 15–16.

253 See Transcript of Trial Day 5 at 72, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 20, 2007) [hereinafter Trial Transcript Day 5].

254 See id. at 80 (explaining Wiegert’s belief that Brendan was functioning at a cognitive level normal for his age); but see Transcript of Trial (Day 6), supra note 27 at 77 (explaining how school authorities recognized Brendan’s need for special).
Special Education, and he did not believe that Brendan was impaired in any way: “He was a mainstream student at Mishicot High School. He was in Driver’s Ed. He could answer questions. He could understand.”

B. Who Did the talking?

Whether in a clinical or forensic setting, the person questioning an adolescent with a language impairment should sit back and let the interviewee do the talking as much as possible. In this interview, the questioners did anything but. There was a remarkable disparity in the amount of talking done by the police and Brendan and although Brendan was the informant, the police spoke more than twice as much (2.5+ times). The police used a total of 18,325 words in the two interviews we focused on, while Brendan used only 6,998, making his contribution a mere 28% of the total interview. These numbers alone (Figure 4) tell us that this interview was utterly inappropriate for Brendan.

Figure 4

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255 Transcript of Trial Day 5, supra note 253, at 80.
256 See Agnew & Powell, supra note 140, at 291.
257 See infra fig. 4. Note, all data and examples are taken from the February and March 2006 interviews unless otherwise indicated. See February Interview, supra note 21; March Interview, supra note 21.
258 See infra fig. 4.
C. The Number of Questions

One of the simplest counts was number of questions put to Brendan. The total for the two interviews was an astonishing 1,525 (February: 286; March: 1,239 questions).259 They asked questions at a startlingly rapid rate—an average of 6.68 questions per minute, or one question every 9–10 seconds. As we saw over and over again with all our data, these high numbers, shocking as they are, are just the beginning of the story.

D. Question Types

The questions were rarely simple, stand-alone affairs. Wiegert and Fassbender sometimes used a series of questions without pausing, or rephrased and recycled questions when Brendan answered “no.”260 They mixed question types, beginning with an open-ended question and, without pausing, posed questions that suggested the content they wanted, and then asking him about the “information” they put into their own questions.261 We were, however, ultimately able to sort the questions well enough to classify them by type (Figure 5).

Almost all of Wiegert and Fassbender’s questions, ninety-eight percent, were question types containing high amounts of content—yes/no, wh- and multiple choice—setting up maximal conditions for contamination, confusion, and, for someone like Brendan, intimidation.262 With these high numbers, it is clear that it was the questions themselves, not Brendan’s answers that were the main vehicles for introducing huge amounts of content into the interview.

259 The first interview was about the same length as a school class period, forty-one minutes—it would be hard for Brendan to sustain attention and concentration; the second obviously much longer, three hours and ten minutes. This is a long time for anyone to concentrate, but especially so for Brendan who would fatigue easily when the primary input is in one of his weakest areas: spoken language. Even in children without impairments, there are limits on the ability to sustain attention. Li-Wei Ko et al., Sustained Attention in Real Classroom Settings: An EEG Study, FRONTIERS HUM. NEUROSCIENCE, July 31, 2017, at 1, 2 (“[P]eople cannot maintain their optimal attention for a long time without falling into a state of fatigue. . . . [M]ental fatigue is . . . associated with a reduced efficiency of ‘brain work.’”).

260 See, e.g., February Interview, supra note 21, at 494–95.

261 See, e.g., March Interview, supra note 21, at 547.

262 See infra fig. 5.
Yes/no questions, which have the highest amount of content and the highest risk of contamination,\textsuperscript{263} were the ones used most often, making up nearly half (47\%) of Wiegert and Fassbender’s questions (674 total).\textsuperscript{264} A few examples show how the police used these questions, and how much content they introduced without Brendan saying much of anything at all.\textsuperscript{265}

W: You helped to tie her up though, didn’t you (pause) Brendan, because he couldn’t tie her up alone,
W: [T]here’s no way.
W: Did you help him tie her up?\textsuperscript{266}

In the next example, Wiegert appears, at first, to try to avoid revealing what answer he wanted, but he could not resist providing the answer in the next question:

\textsuperscript{263} See Agnew & Powell, \textit{supra} note 140, 274–75.
\textsuperscript{264} See \textit{supra} fig. 4.
\textsuperscript{265} For all interview excerpts W = Wiegert, F = Fassbender, and D = Dassey.
\textsuperscript{266} March Interview, \textit{supra} note 21, at 579.
W: And did he choke her until what,
W: [D]id she go unconscious,
W: [W]hat,
W: [T]ell me.  

Wh- questions were also used extensively—about forty-four percent of the total. While they have a place in a good interview on a limited basis, wh- questions must be carefully crafted and monitored to avoid introducing interviewer content. Again, that did not happen:

W: Now, let’s be honest.
W: What did he tell you?
W: What did he show you?
F: What did you see
F: [A]nd what did he tell you?

Wiegert and Fassbender’s wh- questions often presupposed information that Brendan had not given. They were combined with other questions in confusing hodgepodes that suggested how they wanted Brendan to answer, but it was unclear which question to answer or whether to try to answer all of them, as happened here:

F: So, what Mark’s sayin’ is, did he call you
F: [O]r did he come to the door and say Brendan I need you.
F: What, what did he do?

A number of times, Wiegert and Fassbender used an uncomplicated, appropriate wh- question, but then they sabotaged their own question by not pausing for an answer.

F: What did you do then?
F: You had to, are you at the door
F: [O]r where are you?
F: When you first hear the screaming where are you?

267 Id. at 579.
268 Id. at 550.
269 Id. at 553.
270 Id. at 568.
Multiple choice questions, which should never be used, were six percent of all questions. The raw number (ninety-nine total) was substantial enough to see a definite pattern in how the police used these questions to plant content. For example:

W: When was she screaming a lot?
D: [starts to answer] Like
W: While you [were] doing it, after you were doing it, before you did it?

Another instance of multiple choice questions being used:

W: So if you had to say, some dimensions like 2 x 2, 2 feet by 2 feet, 10 x 10, how much blood do you think was there?
D: By 2 x 2.

Open-ended questions, the minimal content questions recommended by so many experts to be the first used and the most used, were almost non-existent—two percent of the total. When the police did use them, it was not in the recommended sequence—to start an interview—or to allow Brendan leeway to introduce his own topics. On one occasion, the police gave themselves the opportunity to begin the interview with a question that actually did elicit a narrative (albeit in a roundabout way), but then they immediately derailed themselves:

W: Should we just go through that whole day again on the 31st
W: [O]r how do you wanna do it?
F: We can that a . . . try to give him a chance to just talk to us and
W: Sure.
F: [I]f he wants to go through the whole day, if he wants to fill in the pieces, that’s, that’s up to Brendan right now.
W: What would you rather do?
F: Just wanna talk to us and tell us startin' with that day and how you actually came to know what happened and stuff.

See infra fig. 6.
See March Interview, supra note 21, at 656.
Id. at 609.
See infra fig. 6.
F: Cuz, I already know you were in the garage and stuff apparently cleaning up and stuff
F: [S]o tell us about that. (Brendan nods “yes”)
[Brendan starts]

W: [Wiegert interrupts] Let’s go back a little bit, OK? 275

The extreme proportion of content-laden questions did not afford much opportunity for Brendan to provide a narrative, and indeed, there is little narrative to be found. The following diagram (Figure 6) gives a sense of the how these percentages and numbers would look in the context of the entire interviews:

![Figure 6](Image)

Other than a thin sliver of open-ended questions, these interviews are overflowing with content provided by Wiegert and Fassbender’s questions. It is not simply that Wiegert and Fassbender sporadically fed Brendan the specific incriminating details that they chose to cobble together to create the “confession.” These interviews were a steady barrage of contaminating content, against which Brendan and his narrative never had a chance.

When we go back to our diagram of best practices, and compare the questioning techniques used with Brendan (Figure 7), we can see how

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275 See March Interview, supra note 21, at 541–42.
far these interviews strayed from anything resembling best practice:

**Figure 7**

**Interview Questions**

![Diagram showing interview questions with Actual and Best Practice categories]

<table>
<thead>
<tr>
<th>Actual</th>
<th>Best Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>51%</td>
<td>41%</td>
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<tr>
<td>41%</td>
<td>41%</td>
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<tr>
<td>6%</td>
<td>6%</td>
</tr>
<tr>
<td>&lt;2%</td>
<td>&lt;2%</td>
</tr>
</tbody>
</table>

- Open-Ended
- Wh-
- Yes/No
- Multiple Choice

Question types in sequence of preferred use

**E. Multiple Questions**

An unusual feature of these interviews is the number of times that Wiegert and Fassbender used multiple questions in a single turn. In order to determine this number, we set the criterion at three or more questions in a turn. By our count, they used three or more questions in a turn a total of thirty-nine times (February: six times; March: thirty-three times).\(^{276}\) If we had used two or more questions as the criterion, the number would have easily exceeded one hundred. We have already included a number of multiple-question turns in our examples above. This additional example shows how a multiple question format was used in combination with other content-feeding questions:

F: And they were just talking,
F: [W]ere they doing anything else?
F: Were they screaming, fighting, talking, pushing,

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\(^{276}\) See February Interview, *supra* note 21; March Interview, *supra* note 21.
Wiegert was asked at trial whether Brendan “would be asked more than one question at a single time before he was allowed to answer.” This minimizing response reveals a striking lack of awareness of the dynamics of the interviews, of how many times this actually happened, and of his (Wiegert’s) own personal conduct.

F. Word Salad and Long Paragraphs

The way Wiegert and Fassbender spoke was related to how much they talked, and was equally problematic. Their language was rife with extensive rambling, disorganization, and dysfluent passages. Their utterances were frequently choppy, with stops and starts in the middle of ideas and filled with mixed or ill-fitting metaphors. These kinds of utterances will be inaccessible for someone who lacks the capacity to sort through the verbiage. This excerpt from a longer passage shows what was typical of Wiegert and Fassbender’s language:

F: [A]nd um and, and, we have had also a chance for two days now to look at what you said and, and listen to the, to tapes a little and stuff like that . . .
D: {Nods}.
F: [A]nd we say, “well you know, Brendan gave us, honestly gave us this information, this information, and that information[,]”
F: [M]aybe I’ll call them dots or whatever
D: {Nods}.
F: [A]nd some of the dots when we look at it, say, “well, I think we need some matching up here, just a little tightening up or something.”
D: {Nods}.
F: We, we feel that, that maybe, I think Mark and I both feel that maybe there’s some, some more that you could tell us, um, that you may have held back for whatever reasons . . .

277 March Interview, supra note 21, at 544.
278 See Trial Transcript Day 5, supra note 253, at 72.
279 Id.
280 See app.2 (containing full relevant passage and SALT transcription).
F: One of the best ways to, to prove to us or more importantly, you know, the courts and stuff is that you tell the whole truth. Don’t leave anything out, don’t make anything up because you’re trying to cover something up a little. Um, and even if those statements are against your own interest, you know what I mean, that, that makes you might, it might make you look a little bad or make you look like you were more involved than you wanna be uh, looked at um, it’s hard to do.

D: {Nods}.

F: But it’s good from that vantage point to say “hey, there no doubt you’re telling the truth because you’ve now given the whole story.” You’ve even given points where it didn’t look real good for you either.

D: {Nods}.

F: And, and I don’t know if I if you, your understanding what I’m saying?

D: [M]m huh.281

Wiegert and Fassbender were also fond of speaking in paragraphs.282 In the March 1st interview, Wiegert and Fassbender had 157 paragraph length turns, and nineteen instances where they followed their paragraphs with questions for Brendan to answer.283 Not surprisingly these paragraphs were not the model of fluency.

In the following passage of over 200 words, we can see the problems the police language presented when Wiegert or Fassbender got on a roll. This passage, in particular, showcases what comprehension problems would arise. Brendan would not just have a hard time understanding this, he would not be able to follow or process it at all.284

F: We’re not gonna go any further in this cuz we need to get the truth out now. We know the fire was going. We know that

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281 Id.

282 In calculating these numbers, we set the standard for “paragraph.” We conservatively set the criterion for spoken ‘paragraphs’ at four or more utterances or sentences in a sequence by a single speaker. Again, had we used a lower number of utterances, the number of spoken paragraphs would have risen dramatically. In assessing speaker turn we used treated Wiegert and Fassbender as a single speaker based on their “tag-team” approach.

283 See March Interview, supra note 21.

284 One of Brendan’s IEP goals was to establish comprehension of sentences that were ten to twelve words long. We also know that his understanding of paragraph length material was exceptionally poor. Trial Exhibit 218, supra note 176.
he had already had his altercation with Teresa. We don’t believe there’s a Monte in there. I talked to ya the other night and you said nothing about Monte you said nothing about something getting punctured and leaking out. We talked about cleaning somethin’ up in that garage. You told me that you thought thinking back now there was blood. It was red in color plus you’re at your house. You said six, six-thirty, I’ll go that far with ya it might even been earlier. What’s goin’ on? Let’s take it through honestly now.

D: {Nods}

W: Come on Brendan. Be honest. I told you before that’s the only thing that’s gonna help ya here. We already know what happened. OK. (Brendan nods “yes”)

F: We don’t get honesty here, I’m your friend right now, but I but I gotta I gotta believe in you and if I don’t believe in you, I can’t go to bat for you. OK. You’re noddin’, tell us what happened.

D: {Nods}

W: Your mom said you’d be honest with us.

D: {Nods}

F: And she’s behind you a hundred percent no matter what happens here.

W: Yep, that’s what she said, cuz she thinks you know more too.

F: We’re in your corner.

D. {Nods}

W: We already know what happened now tell us exactly. Don’t lie.

F: We can’t say it for you Brendan, OK.285

Brendan would not be able to sort through what he did or did not say previously, and hold it in his mind, and attend to, process, and recall all the other subjects the police introduced here—being honest, what the police know, what Brendan knows, being a friend, what his mom said, and so on.

Even when Wiegert or Fassbender were reading from a script, they delivered the message in such a way that comprehension would have been difficult or impossible. The February 27th interview began with Wiegert’s clipped, rapid, dysfluent reading of the *Miranda* rights

285 See March Interview, *supra* note 21, at 547.
from a form. The ellipses indicate brief random pauses:

[B]efore I ask any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to, you have the right to talk . . . to a lawyer for advice . . . before we ask you any questions and have him . . . with you during questioning. You have this right . . . to the advice and presence of a lawyer even though you cannot afford to hire one. We have no way of giving . . . you a lawyer but one will be appointed for you if you wish and if . . . and when you go to court. If you wish to answer questions now without a lawyer present, you have . . . the right to stop answering questions any time. You also have the right to stop answering questions at any time until you talk to a lawyer. I have read the above statement of my rights I understand what my rights are, I am willing to answer questions and to make statements. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made . . . to me and no pressure of any kind has been used against me. Do you agree with that?

What would it be like to be on the receiving end of that, especially as an impaired adolescent like Brendan, with no prior police experience? At a verbal level, the warning is utterly inaccessible for someone like Brendan. This is a paragraph-length chunk of language, which we already know Brendan cannot follow. Before a question is finally asked, there are 263 words and fifteen sentences, many of which are syntactically complex. Two thirds of the way through, Wiegert switches pronouns going from “you” to “I,” again without pausing. The ultimate question “[d]o you agree with that?” is essentially part of a long litany without any clue about what “that” refers to. The obvious response to the question should be “agree with what?” Unfortunately, Brendan just said, “[y]eah.”

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286 See Audio Recordings, supra note 35.
287 App. 3.
288 See February Interview, supra note 21, at 484.
289 See id.
290 See id.
291 Id. While it is tempting to delve into the adequacy of the rights that were read and Brendan’s so-called “waiver,” we are not doing so, despite the fact that the trial court made a gratuitous finding that even if he was in custody “the appropriate Miranda warnings were given, were understood by this defendant, and, thus, . . . had they been custodial interviews, . . .
G. What About Brendan?

Because this is a voluntariness case, it is not enough to simply criticize law enforcement. We must consider Wiegert’s and Fassbender’s conduct in the context of the person they interviewed.\textsuperscript{292} In that context, their behavior was nothing short of cruel. They preyed on Brendan’s primary cognitive weakness: communication. Confronted with a kid who has severely impaired abilities to process, comprehend, and manage language, their words became a weapon. Admittedly, Wiegert and Fassbender did not raise their voices—they did not have to. Instead they talked, and talked, and talked, and with the least clarity possible. They asked over fifteen hundred rapid fire questions that were loaded with content, often with no opportunity for response.\textsuperscript{293} Wiegert and Fassbender repeatedly interrupted Brendan, distracted him, and, as noted by Chief Judge Wood, “refused to leave him alone.”\textsuperscript{294} This interview would have been a challenge for anybody. What this interview would have done to Brendan is beyond imagining.

VIII. JUDICIAL IGNORANCE

There were hundreds of pages of court decisions written in Brendan’s case. In the end though, the only two that mattered were the trial court’s initial denial of the motion to suppress, and the en banc decision by the Seventh Circuit Court of Appeals. Both of these decisions track each other in the analysis of voluntariness, with the Court of Appeals majority fleshing out the trial court’s findings to uphold their reasonableness under the Antiterrorism and Effective Death Penalty Act (AEDPA).\textsuperscript{295} If we had to summarize the essence of the result . . . that the statements were voluntary would remain unchanged.” State v. Dassey, No. 06-CF-88, slip op. at 12 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

\textsuperscript{292} When determining voluntariness, courts are to use a totality of the circumstances test. See J.D.B. v. North Carolina, 564 U.S. 261, 270–71 (2011) (quoting Stanbury v. California, 511 U.S. 318, 322 (1994). “Relevant factors [for consideration] have included such things as where the questioning occurred, how long it lasted, what was said, any physical restraints placed on the suspect’s movement,” and certain personal characteristics of the accused. J.D.B., 564 U.S. at 286 (Alito, J. dissenting); see id. at 271–72 (finding that a child’s age is a relevant characteristic to take into consideration because it effects their perception of whether they are able to freely leave); see also Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (describing additional factors including age, lack of education, or intelligence level).

\textsuperscript{293} See February Interview, supra note 21; March Interview, supra note 21.

\textsuperscript{294} See Dassey v. Dittmann, 877 F.3d 297, 322 (7th Cir. 2017) (Wood, C.J., dissenting).

\textsuperscript{295} See id. at 312. Because the state court of appeals per curiam decision was so brief and conclusory on the issue of voluntariness, the Seventh Circuit focused on the underlying trial court findings. Pursuant to AEDPA, a federal court shall not reverse the judgment of a State
of the decisions it would be that Brendan looked like he understood and therefore he did, and the police behavior looked polite and was therefore not coercive.

The question of voluntariness—“whether a defendant’s will was overborne in a particular case”—is determined by the totality of the circumstances. A court must consider the details of an interrogation as applied to “the unique characteristics of a particular suspect.” While the courts certainly cited the test in their decisions, the decisions actually applied this test to facts in only the most literal sense—strictly on the surface. There was no recognition that there might be anything meaningful about Brendan or the interrogations beneath the appearances. Or to put it in common parlance, they didn’t know what they didn’t know.

A. Brendan

Given the notoriety of this case, first locally, and later nationally, the courts seemed to know surprisingly little about Brendan. They had the basics such as his age and lack of experience with the criminal justice system. They knew he had a full-scale IQ of approximately 80 (borderline to low average), but did not place this in any context. They did not even mention his significantly lower verbal IQ, which was 65.

While verbal IQ is a limited measure, it more accurately reflected where Brendan had profound difficulty than his full-scale IQ. There is nothing in either decision that shows the judges were aware that Brendan’s deficits were almost entirely verbal, that they were

court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

296 See Schneckloth, 412 U.S. at 226.
297 See Schneckloth, 412 U.S. at 226 (citing Brown v. Mississippi, 297 U.S. 278 (1936)).
299 See Dassey, 877 F.3d at 315.
300 See id. at 310.
301 See Transcript of Motion Hearing, supra note 28, at 85–91.
302 See id. at 86.
severe, and that they impacted his entire life, and not just at school.303 There was certainly no indication that these deficits would make Brendan more vulnerable in an interrogation.

The decisions displayed a peculiar misconception about Brendan’s special education needs. The trial court and the Court of Appeals specifically noted that although Brendan was enrolled in some special education, he spent a majority of his time in “regular classes.”304 The Court of Appeals called it “in regular-track classes but [with] some special education help.”305 The implication of those comments is that Brendan really is not all that disabled—that he is in “special ed lite”—which is of course not true.306 Brendan was in a regular classroom for part of the day because the law requires it.307 Moreover, as the 2005 IEP reflects, his progress in those regular classrooms was abysmal, so much so that the school moved two of his classes to the “resource room,”308 and the factors that were implicated in his lack of progress were exactly what we would expect—that litany of poor communication skills from processing to memory to reading.309

The Courts’ observations about Brendan’s flat, low-key demeanor during the interrogations played a significant role in the finding of voluntariness and were equally superficial and off the mark. The trial court said, “[n]othing on the videotape visually depicts Brendan Dassey as being agitated, upset, frightened, or intimidated by the questions of either investigator. His demeanor was steady throughout the actual questioning.”310 This finding suggests that upset, frightened, or intimidated has only one look and that judges know what that is. But a speech-language professional will tell you what the courts saw as “steady throughout” was more likely an attempt to withdraw from a situation that was overwhelming.311

303 See id. at 89–91; Trial Exhibit 219, supra note 19; Trial Exhibit 220, supra note 176. 81:10-91:7; see supra note 176.
304 See State v. Dassey, No. 06-CF-88, slip op. at 3 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).
305 See Dassey, 877 F.3d at 310.
306 See Trial Exhibit 218, supra note 176; Trial Exhibit 219, supra note 19.
307 See L.H. v. Hamilton Cty. Dep’t of Educ., 900 F.3d 779, 789 (6th Cir. 2018). IDEA requires the least restrictive alternative which, in the absence of serious behavioral or social problems, means that a child with disabilities, even severe disabilities, can be mainstreamed in a regular classroom with non-disabled peers whenever possible. Id.
308 See Trial Exhibit 218, supra note 176; Trial Exhibit 219, supra note 19.
309 See Trial Exhibit 218, supra note 176; Trial Exhibit 219, supra note 19.
310 See State v. Dassey, No. 06-CF-88, slip op. at 8–9 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).
311 See id. at 9; Alicia Lynch, How Speech, Language, and Communication Difficulties “Made a Murderer”, MABLE THERAPY, https://mabletherapy.com/2018/11/06/slcn-makingamurderer-
The courts also took note of the fact that Brendan did not, in any way, refuse to cooperate; i.e., “at ‘no time did he ask to stop the interview or request that his mother or a lawyer be present.”312 As his school records clearly show, however, going along is what Brendan does. In classes, he was described as “a very quiet student. He is respectful to teachers. He does not offer answers in class unless he is called on and then he usually won’t talk,” yet, he will occasionally ask questions when he is unsure, however eye contact and participation during discussions with adults and peers is limited.”313 That such an individual would, or could, in some way stand up to the police by asking for a lawyer or his mother is pure folly.314 The Court further relied on the fact that Brendan “nodded” as a sign of acquiescence,315 but the video shows Brendan nodding to anything, even when Wiegert or Fassbender were talking gibberish. The court was equally misguided when it concluded that Brendan “resisted repeated suggestions”316 from Wiegert and Fassbender -- the implication being that this “resistance” demonstrates that the confession was voluntary. The court did not provide any working definition of resist, so we cannot be entirely sure of the standard. However, it looks like the court (along with the state, whose arguments on this point the court apparently adopted) engaged in a wholly subjective I-know-it-when-I-see-it determination317 that relied on carefully selected and edited fragments with Brendan saying “I don’t know”318 or remaining consistent when the police “followed up” with “are you sure?”319

brendan/ (last visited Feb. 27, 2019).

312 See Dassey v. Dittmann, 877 F.3d 297, 311 (7th Cir. 2017); Dassey, slip op. at 9.

313 Trial Exhibit 218, supra note 176.

314 Cf. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (arguing that any younger adolescent would assert themselves that way against the police is highly unlikely).

315 See Dassey, 877 F.3d at 307.


317 The majority of the court, seems to have gone with an intuitive approach toward the question of resistance. Unfortunately, “intuitive judgments are often flawed . . . . Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so.” Chris Guthrie et al., Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 5 (2007).

318 Dassey, 877 F.3d at 309. Arguably, the state was intentionally selective and misleading in its portrayal of this and other aspects of the interrogation. Dassey, 877 F.3d at 320 (Wood, C.J., dissenting).

319 Brief and Short Appendix of Respondent-Appellant, Michael A. Dittmann, supra note 316, at 16–17. We have placed quotation marks around “follow up” because “are you sure?” in
An honest and accurate assessment of whether Brendan’s verbal conduct demonstrated an ability to resist police suggestion and pressure requires an analysis of the entire interview, not simply cherry-picking discrete decontextualized examples. Because this was an important factor in the final outcome, we did just that; we thoroughly reviewed the complete March 1st interview, including verbal and non-verbal conduct, to look for evidence of resistance. We found none.

Overall, Brendan could be described as extremely compliant. He acquiesced by answering questions when he was given the chance, either with brief pieces of content—many of which originated with Wiegert and Fassbender—or with a confirmatory “yes” (247 “yes” responses). He also nodded a lot—236 times—even when police verbiage would have been impossible for him to understand.

Was Brendan ever not in perfect lock-step with Wiegert and Fassbender? Yes, though rarely, and even those so-called deviations could not be considered resisting. He did use the word “no” in his responses 136 times; however, many of these were actually confirmatory “nos.” He replied “I don’t know” or “I can’t remember” forty-one times to the policemen’s 1239 questions. He requested clarification all of four times. Meanwhile, the transcript shows that Brendan changed aspects of the story in response to police questioning fifty-eight times. We found that when Wiegert and Fassbender repeated questions, asked if he was sure, and/or admonished him to tell the truth, Brendan stayed with an answer he gave forty-four times, but even this must be looked at in context. Eleven of these instances involved staying with an answer that he had already changed, or changing it after repeated questioning, even though he initially seemed to stay with it. In other words, when

no way qualifies as a follow up question in the realm of professional interviewing. See Hershkowitz, supra note 148, at app.  
320 This is both a professional and a legal standard. See Dassey, 877 F.3d at 322 (Wood, C.J., dissenting) (“These cases cannot be assessed based on one sentence.”).  
321 See March Interview, supra note 21.  
322 Id.  
323 Id.  
324 Id.  
325 Id.  
326 Id.  
327 Id.  
328 One of the more glaring examples came when Wiegert and Fassbender were asking how many times Ms. Halbach was shot:

W: How many times?
we look at the March 1st interview as a whole, Brendan cannot be said to have resisted anything.\(^{329}\)

One specific aspect of both opinions that truly beggars belief is the finding that Brendan understood the Miranda warnings that were read to him twice.\(^{330}\) Though Miranda itself was not an issue, the courts took the warnings and Brendan's supposed "understanding" and "knowing, voluntary, intelligent waiver" into account in the voluntariness calculus.\(^{331}\) It is hard not to look at Brendan's school and IEP records and say "Really? Really, you think he understood that?" While it is true that Brendan did say he understood and remembered his rights, we do not have to look too far to know that is utterly impossible, especially the way they were read by Wiegert. Understanding Miranda takes a full complement of verbal skills, from processing to verbal memory,\(^{332}\) and Brendan desperately lacked in every one of them.

**B. Law Enforcement Behavior and the Interrogation**

The decisions repeatedly remind us that Wiegert and Fassbender were courteous, perhaps even unctuous.\(^{333}\) "The[y]... stayed calm and never even raised their voices."\(^{334}\) The entire interview,

\[^{2}\text{second pause}.\]
D: Twice.
W: OK.
F: On her body too or where else?
\[^{5}\text{second pause}.\]
F: How many times did he shoot her Brendan?
D: Twice.

*Id.* At first glance, it appears that Brendan stuck with his answer of "twice" in the face of repeated questions. But later in the interview, he changed the answer to ten times. March Interview, *supra* note 21. Later on still, in response to further questioning, he again changed the answer to "ten" at which point Wiegert says "[t]hat makes sense. Now we believe you." *Id.* at 72. We will never know how high Brendan would have gone had Wiegert and Fassbender not accepted "ten."

\(^{329}\) *The Oxford Pocket American Dictionary of Current English* defines "resist" as to "withstand the action or effect of, repel; try to impede, refuse to comply with; offer opposition.

\(^{330}\) See *Dassey*, 877 F.3d at 312.


\(^{332}\) See *LaVigne & Van Rybroek*, *supra* note 18, at 74.


\(^{334}\) *Dassey*, 877 F.3d at 313.
including the admonitions, was done by both investigators in a normal speaking tone with no raised voices, no hectoring, or threats of any kind." 335 Such comments suggest that courteous somehow precludes coercion. But what else could those interviews be called but hectoring? It does not matter whether they used a conversational tone—Wiegert and Fassbender were relentless in their verbal assault on a child with limited verbal functioning.

According to the Court of Appeals, the most that Wiegert and Fassbender did was “press[.] . . . with further questions.” 336 To be sure, simply asking questions will rarely rise to the level of coercion. 337 But the voluntariness standard requires that courts look at the compounding tactics of the police in the context of the individual. 338 In the case of Brendan’s interrogation, the interviewers put 1,525 questions to a juvenile with language processing deficits. 339 They had more questions than all of Brendan’s utterances put together. In the post-conviction hearing, Dr. Richard Leo, an expert on the psychology of false confessions, testified that a tactic that is ordinarily not coercive in small doses might become coercive “if repeated over and over.” 340 With this juvenile, pressing with further questions over 1,500 times will easily become coercive, and then some. 341

The Court of Appeals placed stock in the fact that Brendan allegedly provided incriminating information in response to “open-ended” questions; however, the decision is silent about what those open-ended questions might be. 342 It seems likely that the court relied on an assertion in the state’s brief that “the investigators used primarily broad, open-ended questions and let Dassey tell his story.” 343 The state’s brief went on to give examples. “What did he tell you he did to her?” “What else did he do to her?” “What do you do when she’s on the fire?” “You just heard screaming over

335 Dassey, slip op. at 8.
336 See Dassey, 877 F.3d at 313.
337 See id. at 304.
339 See supra note 259 and accompanying text; Dassey, 877 F.3d at 312.
342 See Dassey, 877 F.3d at 301.
343 Brief and Short Appendix of Respondent-Appellant, Michael A. Dittmann at 13, Dassey, 877 F.3d 297 (No. 16-3397).
there . . . . You went inside, didn’t you?" The only problem is that those are not open-ended questions. Maybe these questions would not draw an objection during direct examination, but that does not mean they are open-ended for interviewing purposes. The examples plant content and direct the narrative as surely as if Wiegert and Fassbender were cross-examining Brendan. As we said previously, these so-called open questions do not exist in isolation; they were embedded in a raging torrent of questions of all types, many of which allowed no opportunity for any answer, let alone a narrative.

The court additionally found that the interviews/interrogation lasted “a relatively brief time.” But like all aspects of an interrogation, time must be considered “as applied to this suspect.” A relatively brief time is just that—relative. While three hours may not be a long time for an adult professional, we must look at it through the eyes of a sixteen-year-old with severe verbal deficits and a psychological profile to match.

For that child, three hours would have been an eternity.

Finally, we have the couch. It is true that during the interview, Brendan was allowed to sit on a comfortable couch rather than at a Formica table with a metal chair. The courts made much of this couch and the “soft’ interview room.” And, indeed, this is the one area where Wiegert and Fassbender followed best practices. Nevertheless, a couch, a bathroom break, a soft drink, and a bag of chips cannot undo the vicious nature of what was done to him.

IX. CONCLUSION: COMING INTO THE 21ST CENTURY

Brendan Dassey is not unique. Among the multitudes who come through the criminal and juvenile justice system, he is not even all

544 Id. at 13–14.
545 See Dassey, 877 F.3d at 320 (Wood, C.J., dissenting). Chief Judge Wood chastised the State for its “tidy and selective summary” of the interrogations. Id.
546 Id. at 301 (majority opinion).
547 See Miller, 474 U.S. at 116.
548 See Trial Exhibit 231, supra note 93, at 2, 5.
549 See Dassey, 877 F.3d at 306.
550 See id.; id. at 322 (Wood, C.J., dissenting); State v. Dassey, No. 06-CF-88, slip op. 7–8 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).
551 Cf. Dassey, 877 F.3d at 317–18 (majority opinion) (analyzing the best police interview methodology). It is possible that Wiegert and Fassbender also tried to establish rapport at the beginning of the interviews. However, establishing rapport requires that the interviewer let the subject talk. Hershkowitz et al., supra note 148, at 434. This was not done.
552 See Dassey, 877 F.3d at 306; see also id. at 337 (Wood, C.J., dissenting) (“His confession was not voluntary and his conviction should not stand, and yet an impaired teenager has been sentenced to life in prison.”).
that unusual. He has severe language deficits, and so do many others found on court dockets and in prisons. What sets Brendan apart is the national attention brought about by a Netflix series. This exposure has afforded us the opportunity to sound the alarm about the common disorder most people have never heard of while talking about a case known by millions.

The final decision in Brendan’s case reflects much that is wrong with criminal justice in the United States. The power of AEDPA, a statutory horror that exalts form and finality over substance and justice, cannot be overstated. The Reid technique—which has been implicated again and again in false confessions, but has no scientific basis whatsoever, and is based on hunch and folk wisdom—is still a widely accepted means of extracting a confession. And, if the majority opinion is to be believed, the American legal system has no interest in best practice.

In her dissent to the en banc decision, Judge Rovner wrote that “most courts’ evaluations of coercion are still based largely on outdated ideas about human psychology and rational decision-making. It is time to bring our understanding of coercion into the twenty-first century.”

We would like to add language, language impairments, and communication into that mix. Moving beyond “a fifty-year-old understanding of human behavior” and human communication should not be impossible, or even all that difficult. It has happened in other countries, taking the form of new models that incorporate contemporary knowledge and best practices.

535 See Trial Exhibit 231, supra note 93, at 2; LaVigne & Rybroek, supra note 18, at 42–43, 44.


536 See Kageleiry, supra note 355, at 31–32. When dozens of studies conducted by social psychologists are combined, a general rule emerges—that “people are poor human lie detectors.” See Kassin, supra note 355, at 809.

537 Dassey, 877 F.3d at 331 (Rovner, J., dissenting).

538 Id. at 333.
In the United Kingdom for example, the widely-used PEACE framework for investigative interviewing of all witnesses and suspects was developed after a series of high-profile wrongful convictions and exonerations.\textsuperscript{359} PEACE is an acronym for a robustly researched model of forensic interviewing that is “non[-]coercive, ethically sound, and evidence based.”\textsuperscript{360} The PEACE model relies on the extensive training, assessment and review of every police officer, as well as specific supervisor training to provide this feedback to officers.\textsuperscript{361} Additionally, the PEACE model incorporates pre-interview preparation to help anticipate special needs or issues, with a clear preference for open-ended questions.\textsuperscript{362} Much has been written about PEACE and why it is superior to the interrogation methods that continue to be used in the United States.\textsuperscript{363}

The United Kingdom has also utilizes a “Registered Intermediary Scheme,” a bold program specifically designed to protect the special needs of witnesses and suspects with language deficits.\textsuperscript{364} This is part of a national campaign to increase public awareness about language impairments, especially in the criminal justice system.\textsuperscript{365} Recognizing that linguistically-impaired individuals are vulnerable and face gargantuan hurdles when dealing with police, lawyers, and judges, the Intermediary Scheme provides for a professional communication specialist such as a speech-language pathologist to assist with communication during witness interviews and testimony in cases where an assessment shows the individual to be vulnerable.

\textsuperscript{359} See Schollum, supra note 244, at 30, 32. The PEACE system is also used in parts of Canada and Australia. Id. at 33.

\textsuperscript{360} Id. at 32.

The letters of PEACE stand for:
- Planning and Preparation
- Engage and Explain
- Account (Clarification and Challenge)
- Closure
- Evaluation

\textsuperscript{361} Id. at 34. The PEACE system requires up to eighteen days of initial training, combined with on-going review, feedback, and updated training. Id. This is based on the recognition that “few investigators have an innate ability to carry out investigative interviews with the necessary levels of skill and sensitivity expected by the public and the criminal justice system—it takes training and practice to develop this ability.” Id. at 30.

\textsuperscript{362} See id. at 33; see generally Oxburgh, et al., supra note 167, at 48, 61 (explaining the importance of open-ended questions).

\textsuperscript{363} See Schollum, supra note 244, at 33, 34.

\textsuperscript{364} See COLES ET AL., supra note 100, at 20; Northern Ireland Registered Intermediary Scheme, DEPT JUST., https://www.justice-ni.gov.uk/ri (last visited Feb. 28, 2019).

\textsuperscript{365} See COLES ET AL., supra note 100, at 17–18.
due to deficits in communication. In Northern Ireland the program has been extended to include vulnerable accused, like Brendan. England and Wales are considering intermediaries for accused individuals as well.

Whether either of these systems is adaptable to the United States, the point is that new ways of thinking about communication and psychology on a large scale are indeed possible. The American legal system need not be inextricably bound to the kind of hackneyed, surface level assessments that the criminal justice system routinely dispenses and that we saw here. Until that day however, we can expect countless more “extreme malfunctions,” like this one. The only difference is that they will not be on TV.

Before we ever started this project, we were fairly certain that what happened to Brendan Dassey in the police department interview room, and later in the courtroom, was an indictment against the entire criminal justice system. Taking a closer look, under the hood, removed all doubt. This is truly a profound miscarriage of justice.

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366 See Penny Cooper & Michelle Mattison, Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model, 2 INT'L J. EVIDENCE & PROOF 351, 352 (2017); Northern Ireland Registered Intermediary Scheme, supra note 364.

The assessment framework may include exploration of the person’s:
1. receptive communication (ability to understand language and question forms);
2. expressive language (ability to use language to inform, describe and clarify);
3. ability to refute inaccurate suggestions;
4. ability to shift perspective (comprehension of other people’s thoughts and beliefs and feelings);
5. ability to concentrate and attend to tasks, and to manage his/her own arousal and anxiety;
6. [and] use of external aids to support communication, such as drawing and ‘cue cards’

Cooper & Mattison, supra note 366, at 358. Brendan would clearly meet the criteria.


368 Cooper & Mattison, supra note 366, at 360–61.

369 See Dassey v. Dittmann, 877 F.3d 297, 319 (7th Cir. 2017) (Wood, C.J., dissenting). The malfunctions are not limited to involuntary statements. Unrecognized language deficits can cause breakdowns in the attorney client relationship, the ability to participate, and decision-making. See LaVigne & Van Rybroek, supra note 17, 78, 87–88, 94; see also LaVigne & Van Rybroek, supra note 18, at 44–45, 66, 70 (explaining the importance of communication with an attorney for people with language disorders).

370 Throughout this article, we have used the metaphor of looking under the hood. It is not lost on the co-authors that damming evidence against Steven Avery was found under the hood of Teresa Halbach’s car. We believe that proves our point about the importance of looking beneath the surface.
## APPENDIX 1: INTERVIEW CHARACTERISTICS DATA TABLE

<table>
<thead>
<tr>
<th>Date of Interview</th>
<th>11/5/05 Marinette</th>
<th>2/27/06 Wiegert/Fassbinder</th>
<th>3/1/06 Wiegert/Fassbinder</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time</strong></td>
<td>1 hour, 18 min 78 minutes</td>
<td>41 min</td>
<td>3 hours, 10 min 190 minutes</td>
</tr>
<tr>
<td><strong>Amount of talk per speaker</strong></td>
<td>PO BD W&amp;F BD</td>
<td>PO BD W&amp;F BD</td>
<td>PO BD W&amp;F BD</td>
</tr>
<tr>
<td>Total number of words</td>
<td>6234 2308 3215</td>
<td>1257 15020</td>
<td>5741</td>
</tr>
<tr>
<td>% of words spoken by each speaker</td>
<td>2.7x more than BD 27% of interview</td>
<td>2.5x more than BD 28% of interview</td>
<td>2.6x more than BD 27.6% of interview</td>
</tr>
<tr>
<td><strong>Police</strong></td>
<td>? Type Total # each type % of total ?</td>
<td>Total # each type % of total ?</td>
<td>Total # each type % of total ?</td>
</tr>
<tr>
<td>Questions: high content</td>
<td>Yes/No</td>
<td>344 64% 137 48.0% 577 47.0%</td>
<td>Wh-</td>
</tr>
<tr>
<td>Questions: minimal content</td>
<td>Multiple Choice</td>
<td>25 5% 19 6.6% 80 6.0%</td>
<td>Open-ended</td>
</tr>
<tr>
<td>Total # ?</td>
<td>540 286 1239</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of ?? per minute</td>
<td>6.8 6.97 6.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brendan</td>
<td>11/5/05 2/27/06 3/1/06</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1-21 words</td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td>------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Words per turn (range)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Length</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Half of BD's utterances were 0 (nods) or 1, 2, 3 words long</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median turn length</td>
<td>4 words</td>
<td>2 words</td>
<td>2 words</td>
</tr>
</tbody>
</table>
APPENDIX 2: FULL “I’LL CALL THEM DOTS . . .” PASSAGE

1. Full ‘dots’ passage SALT code marking removed:

Speakers: F=Fassbiner, W=Weigert, D=Brendan Dassey

F: Brendan, I want you to, to relax, OK?
D: {Nods}.
F: Um, a little more comfortable here and stuff.
D: {Nods}.
F: And, what we like, you had a couple more days since we last talked now, which was Monday.
F: And you had a chance to reflect and breathe, I imagine, just ‘aaah’ {takes deep breath}.
D: {Nods}.
F: And we um . . .
W: Do you have a pen on you?
W: [unintelligible].
W: [unintelligible]. only one?
W: I [unintelligible].
F: I got more.
W: OK.
F: And, uh I kinda call it, it’s a sense debriefing in a way, you know, just letting you talk to us a little.
D: {Nods}.
F: And um and, and, and we have had also a chance for two days now to look at what you said and, and listen to the, to tapes a little and stuff like that.
D: {Nods}.
F: And you know we look at that.
F: And we say, “well, you know, Brendan gave us, honestly gave us this information, this information, that information”.
F: Maybe I’ll call them dots or whatever.
D: {Nods}.
F: And some of the dots when we look at it, say, “well, I think we need some matching up here, just a little tightening up here or something”.
D: {Nods}.
F: We, we feel that, that maybe, I think Mark and I both feel that maybe there’s some, some more that you could tell us,
um, that you may have held back for whatever reasons.
F: And I don’t wanna assure you that Mark and I are both are in your corner.
D: {Nods}.
F: We’re on your side.
F: And you did tell us yourself that one of the reasons you hadn’t come forward yet was because you were afraid.
D: {Nods}.
F: You were scared.
F: And, and one of the reasons you were scared was that you would be implicated in this.
F: Or people would say that you helped or did this.
D: Mhm {Nods}.
F: OK.
F: And that you might get arrested and stuff like that, OK?
D: {Nods}.
F: And we understand that.
F: One of the best ways to, to, to prove to us or more importantly, you know, the courts and stuff is that you tell the whole truth.
F: Don’t leave anything out, don’t make anything up because you’re trying to cover something up a little.
F: Um, and even if those statements are against your own interest , you know what I mean, that, that makes you might, it might make you look a little bad or make you look like you were more involved than you wanna be uh, looked at um, it’s hard to do.
D: {Nods}.
D: {Nods}.
F: But it’s good from that vantage point to say “hey, there no doubt that you’re telling the truth because you’ve now given the whole story”.
F: You’ve even given points where it didn’t look real good for you either.
D: {Nods}.
F: And, and, I don’t know if I if you, are you understanding what I’m saying?
D: Mhm.
F: And, and that’s why we kinda came here, to let you talk a little, maybe get some stuff off your mind or chest if you need
to and then to tell us the whole truth, to take us through this whole thing that happened on Monday, not leaving anything out, not adding anything in.
F: Because if our guy looked at, looked at the tapes, looked at the notes and it's real obvious there's some places where some things were left out or maybe changed just a bit to, to maybe looking at yourself, to protect yourself a little um, from what I'm seeing even if I fill those in, I'm thinking you're alright.
F: OK?
F: Y- you don't have to worry about things.
D: {Nods}.
F: Um, we're, we're there for you.
F: Um and I and, and we know what Steven did.
F: And, and, and we know kinda what happened to you and what he did.
F: We just need to hear the whole story from you.
F: As soon as we get that and we're comfortable with that, I think you're gonna be a lot more comfortable with that.
F: It's gonna be a lot easier on you down the road uh, if this goes to trial and stuff like that.
F: We need to know that because it's probably gonna come out.
F: Think of Steven for a second.
F: Steven is already starting to say some things.
F: and eventually he's gonna potentially lay some crap on you and try and make it look like you were the bad person here.
F: Um, and we don't want that.
F: We want everything out front so we can say, “yeah, we knew that, Steven”.
D: {nods}.
F: He told us that.
F: Yeah you know, you get my drift?
D: {Nods}.
F: I'm no - I don't know Mark has something or, something [ unintelligible].
F: So I'm just gonna give you an opportunity to talk to us now, and and, and kind of fill in those gaps for us.
W: Honesty here Brendan is the thing that’s gonna help you.
W: OK no matter what you did.
D: Mm {nods}.
W: We can work through that.
W: OK?
D: {Nods}.
W: We can’t make any promises.
W: But we’ll stand behind you no matter what you did.
W: OK?
D: {Nods}.
W: Because you’re being the good guy here.
W: You’re the one saying, “you know what”?
W: “Maybe I made some mistakes”.
W: “But here’s what I did”.
W: The other guy involved in this doesn’t wanna help himself.
W: All he wants to do is blame everybody else.
W: OK?
D: {Nods}.
W: And by you talking with us, is, it’s helping you.
D: {Nods}.
W: OK?
W: Because the honest person is the one who’s gonna get a better deal out of everything.
W: You know how that works.
D: Mhm {nods}.
W: You know.
W: Honesty’s the only thing that will set you free.
W: right?
D: {Nods}.
W: And we know, like Tom said, we know, we reviewed those tapes.
W: We know there’s some things you left out.
W: And we know there’s some things that maybe weren’t quite correct that you told us, OK?
W: We’ve done, we’ve been investigating this a long time.
W: We pretty much know everything.
D: {Nods}.
W: That’s why we’re talking to you again today.
D: {Nods}.
W: We really need you to be honest this time, with everything, OK?
D: {Nods}.
W: If, in fact, you did some things, which we believe some things may have happened, that you didn’t wanna tell us
about.
W: it's OK.
W: As long, as you can as long as you be honest with us, it's OK.
D: {Nods}.
W: If you lie about it that’s gonna be problems. [sic]
W: OK?
D: {Nods}.
W: Does that sound fair?

2. Full “dots” passage as it appears in SALT transcript, including codes

Speakers: F=Fassbinder, W=Weigert, D=Brendan Dassey

F: Brendan, I want you (to) to relax, <OK> [SI-1]?
D: <{Nods}> [g] [SI-X].
F: (Um) *it's a little more comfortable here and stuff [SI-0].
D: <{Nods}> [g] [SI-X].
F: <And> (what we like) you had a couple more day/s since we last talk/ed now, which was Monday [SI-3].
F: And you had a chance to reflect and breathe, I imagine, just <%faaah> {takes deep breath} [SI-2].
D: <{Nods}> [g] [SI-X].
F: And <> we (um)^W: <Do you have a pen on you> [SI-1]?
:02
W: XXX [SI-X].
W: XX only one [SI-X]?
W: I XX [SI-X].
F: I got more [SI-1].
W: OK [SI-X].
F: And (uh I kinda call it it) it's *in a sense debriefing in a way, you know, just letting you talk to us a little [SI-3].
D: <{Nods}> [g] [SI-X].
F: <(And um> and and) and we have had[EW] also *had a chance for two day/s now to look at what you said <(and) and listen> (to the) to tape/s a little and stuff like that [SI-2].
D: <{Nods}> [g] [SI-X].
F: And you know we look at that [SI-2].
F: And we say, “well, you know, Brendan (gave us) honestly gave us this information, this information, that information” [SI-3].
F: Maybe I’ll call them dot/s or whatever [SI-1].
D: <{Nods}> [g] [SI-X].
F: <And some> of the dot/s when we look at it, say, “well, I think we need some matching up here, just a little tightening up here or something” [SI-4].
D: <{Nods}> [g] [SI-X].
F: <{We we feel that}, that maybe) I think Mark and I both feel that maybe there/s (some) some more that you could tell us, (um) that you may have held back for whatever reason/s [SI-5].
F: And I (don’t) wanna assure you that Mark and I (are) both are in your corner [SI-2].
D: <{Nods}> [g] [SI-X].
F: <We’re on> your side [SI-1].
F: And you did tell us yourself that one of the reason/s you had/n’t come forward yet was because you were afraid [SI-4].
D: <{Nods}> [g] [SI-X].
F: <You were scared> [SI-1].
F: (And) and one of the reason/s you were scared was that you would be implicated in this [SI-3].
F: Or people would say that you help/ed or did this [SI-2].
D: Mhm <{Nods}> [SI-X].
F: <OK> [SI-X].
F: And that you might get arrested and stuff like <that, OK> [SI-1][Y/Ntag]? 
D: <{Nods}> [g] [SI-X].
F: And we understand that [SI-1].
F: One of the best way/s (to to) to prove to us or more importantly, you know, the court/s and stuff is that you tell the whole truth [SI-3].
F: don’t leave anything out [SI-1].
F: don’t make anything up because you’re try/ing to cover something <up a little> [SI-2].
F: (um) and even if those statement/s are against your own interest , <you know what I mean>, (that) that (make/3s you might) it might make you look a little bad or make you look
like you were more involved than you wanna be (uh) looked at (um) it's hard to do [SI-9].
D: <{Nods}> [g] [SI-X].
D: <{Nods}> [g] [SI-X].
F: But it's good from that vantage point to say "hey, there *is no doubt that you're tell/ing the truth because you've now given the whole story" [SI-3].
F: You've even given point/s where it did/n't look real good for you either [SI-2].
D: <{Nods}> [G] [SI-X].
F: (And) and (I don't know if I if you) are you understand/ing what I'm say/ing [SI-2]?
D: Mhm [SI-X].
F: (And) and that/s why we kinda came here, to let you talk a little, maybe get some stuff off your mind or chest if you need to and then to tell us the whole truth, to take us through this whole thing that happen/ed on Monday, not leaving anything out, not adding anything in [SI-4].
F: Because if our guy (look/ed at) look/ed at the tape/s, look/ed at the note/s and it's real obvious there/s some place/s where some thing/s were left out or maybe changed just a bit (to to maybe looking at yourself) to protect yourself a little (um) from what I'm see/ing even if I fill those in, I'm think/ing you/ 're alright [SI-9].
F: OK [SI-X][Y/Ntag]?
F: <(Y*) you don't have to worry about thing/s> [SI-1].
D: <{Nods}> [g] [SI-X].
F: (Um we're) we're there for you [SI-1].
F: (Um and I and) and we know what Steven did [SI-2].
F: (And and) and we know kinda what happen/ed to you and what he did [SI-3].
F: We just need to hear the whole story from you [SI-1].
F: As soon as we get that and we're comfortable with that, I think you're gonna be alot more comfortable with that [SI-4].
F: It's gonna be alot easier on you down the road (uh) if this go/3s to trial and stuff like that [SI-2].
F: We need to know that because it's probably gonna come out [SI-2].
F: Think of Steven for a second [SI-1].
F: Steven is already start/ing to say somethings [SI-1].
F: and eventually he’s gonna potentially lay some crap on you and try and make it look like you were the bad person here [SI-3].
F: (Um) and we don’t want that [SI-1].
F: We want everything out front so we can say, “yeah, we knew that, Steven” [SI-3].
D: {nodding} [G] [SI-X].
F: He told us that [SI-1].
F: Yeah you know, you get my drift [SI-2]?
D: {Nods} [g] [SI-X].
F: (I’m no*) I don’t know *if Mark has (something or) something X [SI-X].
F: So I’m just gonna give you an opportunity to talk to us now (and and) and kind of fill in those gap/s for us [SI-1].
W: Honesty here Brendan is the thing that’s gonna help you [SI-2].
W: <OK no> matter what you did [SI-1].
D: <Mm {nods}> [g] [SI-X].
W: We can work through that [SI-1].
W: OK [SI-X]/[Y/Ntag]? 
D: <{Nods}> [g] [SI-X].
W: <We can’t make any> promise/s [SI-1].
W: But we’ll stand behind you no matter what you did [SI-2].
W: <OK> [SI-X]?
D: <{Nods}> [g] [SI-X].
W: Because you’re be/ing the good guy here [SI-1].
W: You’re the one say/ing, “you know what” [SI-2]?
W: “Maybe I made some mistake/s” [SI-1].
W: The other guy involved in this does/n’t wanna help himself [SI-1].
W: All he want/3s to do is blame everybody else [SI-1].
W: <OK> [SI-X]/[Y/Ntag]? 
D: <{Nods}> [g] [SI-X].
W: And by you talk/ing with us, (is) it/s help/ing you [SI-2].
D: <{Nods}> [g] [SI-X].
W: <OK> [SI-X]/[Y/Ntag]? 
W: Because the honest person is the one who/s gonna get a better deal out of everything [SI-2].
W: You know how that work/3s [SI-2].
D: Mhm <{nods}> [g] [SI-X].
W: <You know> [SI-1].
W: Honesty’s the only thing that will set you free [SI-2].
W: <right> [SI-X][Y/Ntag]?
D: <{Nods}> [g] [SI-X].
W: And (we know) like Tom said, (we know) we review/ed those tape/s [SI-2].
W: We know there’s some thing/s you left out [SI-2].
W: And we know there’s some thing/s that maybe were/n’t quite correct that you told us, OK [SI-3][Y/Ntag]? W: (We’ve done) we’ve been investigating this a long time [SI-1].
W: We pretty much know <everything> [SI-1].
D: <{Nods}> [g] [SI-X].
W: That’s why we’re talk/ing to you again <today> [SI-2].
D: <{Nods}> [g] [SI-X].
W: We really need you to be honest this <time, with everything, OK> [SI-1][Y/Ntag]?
D: <{Nods}> [g] [SI-X].
W: If, in fact, you did some thing/s, which we believe some thing/s may have happened, that you did/n’t wanna tell us about [SI-4].
W: it’s OK [SI-1].
W: (as long <as you can>) as long as you be honest with us, it/’s OK [SI-2].
D: <{Nods}> [g] [SI-X].
W: If you lie about it that/’s gonna be *a problem/s[EW:problem] [SI-2].
W: OK [SI-X]?
D: {Nods} [g] [SI-X].
W: Does that sound fair [SI-1][Y/NAux]?
APPENDIX 3: FEBRUARY 27TH MIRANDA WARNINGS WITH SALT CODING

- 0:04
W: XXX.
; :03
W: Alright, Brendan, (um) one thing I’m gonna ask you to do is when we start talking then you have to speak up, OK, kinda like I am <>, otherwise the thing won’t pick up real[EW:very] well [SI-6].
D: <Mhm> {nods} [g] [SI-X].
W: But before we ask you any question/s Brendan (um) I have to read you your right/s [SI-2].
W: It/s just what we have <to do> [SI-2].
D: <{Nods}> [g] [SI-X].
W: XX one of those thing/s, OK [SI-X]?  
W: Before I ask you any question/s you must understand your right/s [SI-2].
W: You have the right to remain silent [SI-1] {reading aloud}.  
W: Anything you say can be used against you in court [SI-1].
W: (You have to) you have the right to talk to a lawyer for advice before we ask you any question/s and have him with you during the questioning [SI-2].
W: You have this[EW:the] right to the advice and presence of a lawyer even though you can not afford to hire one [SI-2].
W: We have no way of giving you a lawyer [SI-1].
W: But one will be appointed for you if you wish (and if) and[EW] when you go to court [SI-3].
W: If you wish to answer question/s now without a lawyer present, you have the right to stop answering question/s at any time [SI-2].
W: You also have the right to stop answering question/s at any time until you talk to a lawyer [SI-2].
W: I have read the above statement of my right/s [SI-1].
W: I understand what my right/s are [SI-2].
W: I am will/ing to answer question/s and to make a statement [SI-1].
W: I do not want a lawyer [SI-1].
W: I understand and know what I am do/ing [SI-2].
W: No promise/s or threat/s have been made to me [SI-1].
W: And no pressure of any kind has been used against me [SI-1].
W: Do you agree with that [SI-1]?
D: Yeah [g] [SI-X].
W: You have to speak up a little bit [SI-1].
D: Yeah [SI-X].
W: Yes?
D: {Nods} <yeah> [g][SI-X].
W: <OK>.
W: And then if you agree with making a statement I need you to sign right there {slides paper and pen to B} [SI-2].
W: And if you wanna read it you can read it there [SI-2].
- 1:30
= D signs paper
- 1:39
W: Why don’t you put your initial/s here and put your initial/s here [SI-2] [G]?
W These are the two thing/s I read to you [SI-2].
- 1:44
= D signs paper
- 1:47
W: OK [SI-X].
W: And I’m just going to put the place up here, Two_Rivers_Police_Department [SI-1].
; :02
W: And the date is two_twenty_seven_o_six [SI-1].
W: And the time is approximately three_twenty_one PM [SI-1].
; :03
W: {Writes on paper} OK.
W: I’ll just put that over there for now [SI-1].